83 - 1275



No. 83-1275

# In the Supreme Court of the United States

**OCTOBER TERM, 1983**

**STATE OF OREGON
DEPARTMENT OF COMMERCE,**

**Petitioner,**

**v.**

**TOMMY G. PAYNE,**

**Respondent.**

**Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon**

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## QUESTIONS PRESENTED

1. In the context of a dismissal of a state employee, does a pretermination notice satisfy the requirements of the Due Process Clause of the Fourteenth Amendment even though it does not specify particular dates, places, and persons in otherwise detailed allegations of misconduct?

2. If not, does the Fourteenth Amendment Due Process Clause require that the public employee dismissed for misconduct be reinstated and awarded full back pay, even though the lack of specification in the pretermination notice was cured when the employee was afforded "the full panoply of procedural rights" before and during a post-termination hearing?

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Constitutional Provisions



Statutory Provisions

Petitioner State of Oregon Department of Commerce (hereinafter "the state") respectfully prays that this Court issue a writ of certiorari to review the judgment and opinions of the Court of Appeals of the State of Oregon in *Payne v. Department of Commerce* (Court of Appeals No. A24178).

## OPINIONS BELOW

On December 29, 1982, the Oregon Court of Appeals affirmed an order of the Employment Relations Board setting aside the dismissal of Tommy G. Payne, a state employee. That decision is reported as *Payne v. Department of Commerce*, 61 Or. App. 165, 656 P.2d 361 (1982) (Appendix A).

On March 30, 1983 the Oregon Court of Appeals granted the parties' petitions for reconsideration and issued an opinion adhering to its former opinion. The opinion after reconsideration is reported as *Payne v. Department of Commerce*, 62 Or. App. 433, 661 P.2d 119 (1983) (Appendix B).

On November 1, 1983 the Oregon Supreme Court denied the state's petition for discretionary review of the Court of Appeals opinions. *Payne v. Department of Commerce*, 295 Or. 446 (1983) (Appendix C).

## JURISDICTION

On November 1, 1983, the Oregon Supreme Court denied the state's petition for review. The state's petition for certiorari in this Court is due January 30, 1984 as provided by 28 U.S.C. § 2101(c). The

state invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, section 1, clause 3:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law."

## STATEMENT OF THE CASE

This petition raises questions about the meaning and extent of procedural requirements imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The case involves a dismissal for cause of a state employee. This summary identifies how and when constitutional issues were raised and disposed of below and what procedures were involved in the entire termination process. It does not describe the factual basis for the termination.

On April 29, 1981, the state mailed a predismissal notice to respondent state employee Tommy Payne, an inspector in the Building Codes Division of the state's Commerce Department. The notice charged Payne with commission of several violations of the state's conflict of interest policies. The initial notice did not identify specific dates, places, persons, or business transactions involved on the alleged violations. The predismissal notice provided as follows:

> "*Charges and Complaints*: 1. Approximately one year ago you obtained recreational vehicle-related merchandise either by purchase, consignment or other type of receipt. 2. You attempted to sell recreational vehicle merchandise, while performing your inspection duties, on at least four occasions to various RV businesses inspected by you in the normal course of your duties. 3. You also transported this merchandise in the trunk of your State car on at least one of these four occasions. 4. You have concealed from your supervisors the fact that you engaged in business transactions with such regulated business firms or plant owners; that you offered the merchandise for sale during work hours and on State travel status; and that you were transporting some of this merchandise in a State car. 5. You failed to report your potential conflict of interest." (Board Ex. 1).

Payne was accorded an opportunity to meet with the appointing authority to discuss the charges. The meeting occurred on May 8, 1981. On May 25, 1981, Payne was dismissed. The dismissal notice advised Payne of his right to a post-termination hearing, and he requested such a hearing.

After dismissal but before the post-termination hearing, Payne was provided all of the particulars of the allegations against him.

On July 9 and July 23, 1981, the State of Oregon Employment Relations Board (hereafter the "E.R.B.") held a post-termination evidentiary hearing on the charges against Payne. At the

hearing, Payne argued that the predismissal notice violated a state administrative rule and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Tr. 341-344). On March 5, 1982 the E.R.B. entered its "Rulings on Motions, Findings of Fact, Conclusions of Law and Order" (hereafter "the E.R.B. order"). (Appendix D). The E.R.B. found that the state had proved all of the charges against Payne by a preponderance of the evidence. (E.R.B. Order 6).

Despite its finding that the dismissal was warranted, the E.R.B. set aside the dismissal on the ground that the predismissal notice violated a state administrative rule. The relevant rule requires that the pre-termination notice identify the charges supporting dismissal with sufficient specificity to provide the employee an opportunity to refute the charges or to offer evidence in mitigation. (E.R.B. Order 6-8). The E.R.B. set aside the dismissal despite the following observation:

> "Our conclusions on the notice issue may well exalt form over substance. Mr. Payne clearly committed the acts complained of, and just as clearly those acts warrant dismissal. Moreover, it is difficult to see how Payne was actually harmed by Respondent's failure to provide more specific notice (i.e. comply with the rule). * * * Nevertheless, we do not believe that noncompliance with a rule intended to afford 'due process' notice can be ignored on the basis that such noncompli-

> ance was ultimately shown to be nonprejudicial." (E.R.B. Order 13, n. 20). [Citation omitted.]

Having decided that the predismissal notice did not comply with the administrative rule and that such noncompliance required setting the dismissal aside, the E.R.B. did not reach the issues of the constitutional adequacy of the predismissal notice or the consequences of any constitutional inadequacy.

The state appealed the E.R.B. order to the Oregon Court of Appeals contending that the E.R.B. erred in setting aside the dismissal on the basis of a nonprejudicial procedural error. This drastic remedy was directly contrary to the Court of Appeals' statutory holding, in *Ashman v. Children's Services Division*, 37 Or. App. 865, 588 P.2d 665 (1978), that a procedural defect which does not prejudice the substantial rights of a party is not cause for reversal. (App. Br. 11).

In a separate assignment of error, the state contended that reinstatement and back pay, implicit consequences of "setting aside" the dismissal, were beyond the statutory authority of the E.R.B.. The relevant statutory authority, Oregon Revised Statutes [hereinafter Or. Rev. Stat.] 240.560, authorizes reinstatement and back pay only when the dismissal "was not taken in good faith for cause." (App. Br. 14).

On appeal to the Oregon Court of Appeals, the court affirmed the E.R.B. order, but on substantially

different grounds. In response to the state's first contention, the court modified its previous holding in *Ashman v. Children's Services Division*, *supra*, finding it had applied the incorrect statute. However, the court agreed with the state's second contention that the E.R.B. had no statutory authority under Or. Rev. Stat. 240.560 to award reinstatement and back pay for nonprejudicial procedural errors. *Payne v. Department of Commerce*, 61 Or. App. at 174, 656 P.2d at 365-366. (Appendix A at 9).

Nevertheless, the Court of Appeals affirmed the E.R.B. order. The court went beyond the issues decided by the E.R.B. and held that the predismissal notice was insufficient under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Payne v. Department of Commerce*, 61 Or. App. at 175-176, 656 P.2d at 367 (Appendix A at 10-11). Relying on two prior Oregon Supreme Court cases interpreting the Due Process Clause, the Court of Appeals held that the federal constitution requires reinstatement and back pay because the predismissal notice was constitutionally defective. *Payne v. Department of Commerce*, 61 Or. App. at 175, 656 P.2d at 367. (Appendix A at 10). This is the primary holding challenged by the state in this petition.

After the Court of Appeals issued its opinion, the state filed a petition for review in the Oregon

Supreme Court. In its petition, the state argued that due process did not require a more specific notice under these circumstances. Furthermore, the state directly challenged the two prior Oregon Supreme Court cases on which the Oregon Court of Appeals relied in resolving the constitutional remedy issue, *Hammer v. O.S.P.*, 276 Or. 651, 556 P.2d 1348 (1976), *vacated* 434 U.S. 945 (1977), *aff'd on remand* 283 Or. 369, 583 P.2d 1336 (1978), and *Tupper v. Fairview Hospital*, 276 Or. 657, 556 P.2d 1340 (1976). The state contended that the Oregon Supreme Court's federal constitutional law holdings in these cases were in conflict with the holdings of this Court, the United States Circuit Courts of Appeals and other state courts.

In Oregon, a petition for review to the Oregon Supreme Court is automatically referred to the Oregon Court of Appeals for reconsideration before being considered by the Oregon Supreme Court. The Oregon Court of Appeals granted the petition for reconsideration and issued a second opinion adhering to its first decision. It reaffirmed its conclusion that the predismissal notice was constitutionally insufficient. However, on the remedy issue, the court agreed with the state's contention that the prior Oregon Supreme Court decisions had misinterpreted federal constitutional law. Nevertheless, the intermediate appellate court determined that it was

bound, by the Oregon Supreme Court's decisions, to reaffirm the reinstatement and back pay order. The court stated:

> "Finally, the Division argues that, with respect to the scope of the *remedy* to which an improperly-terminated member of the classified service is entitled, the two principal Oregon Supreme Court cases upon which we relied in our former opinion — *Hammer v. O.S.P.*, 276 Or. 651, 556 P.2d 1348 (1976), *vacated* 434 U.S. 945, 90 S.Ct. 469, 54 L.Ed.2d 306 (1977), *aff'd on remand*, 283 Or. 369, 583 P.2d 1136 (1978) and *Tupper v. Fairview Hospital*, 276 Or. 657, 556 P.2d 1340 (1976) — are wrongly decided. We agree — but there just is nothing that this court can do about that. The Division's argument on this score is commended to the attention of the Supreme Court." *Payne v. Department of Commerce*, 62 Or. App. at 438, 661 P.2d at 122. (Appendix B at 16).

On November 1, 1983 the Oregon Supreme Court denied the state's petition for review.

## ARGUMENT

The questions presented by this case raises two important issues of federal constitutional law which should be resolved by this Court. Those issues arise in the context of public employment, an area of national concern. The first issue regards the degree of specificity that the predismissal notice to a public employee constitutionally must contain. This Court has not directly addressed this issue. As this case demonstrates, the general principles of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) and *Arnett v.*

*Kennedy*, 416 U.S. 134, 170 (1974) do not serve as sufficient guideposts for governmental employers and employees and for courts called upon to rule on issues relating to personnel relations in the public sector. This case presents a highly desirable opportunity to refine the requirements for a predismissal notice.

The second issue, regarding the scope of the constitutionally required remedy for a nonprejudicial but technically insufficient predismissal notice is, perhaps, of even greater significance. The Oregon Court of Appeals' resolution of this issue, although compelled by Oregon Supreme Court interpretations of the federal constitution which the Court of Appeals deemed erroneous, stands in direct conflict with the rationale of opinions of this Court and the reasoning and holdings of the federal courts of appeal in similar cases. The conflict between the Oregon judiciary's view of the remedial aspects of the Due Process Clause and the proper view articulated by this Court and followed by other state and federal courts should be resolved promptly. The aberrant Oregon view of constitutional remedies should be unequivocally repudiated.

**Discussion**

Although hobbled by its status as an intermediate appellate court, the Oregon Court of Appeals correctly observed that prior Oregon Supreme Court

determinations of the remedial scope of the Due Process Clause were erroneous.

Like the present case, the Oregon Supreme Court's decision in *Tupper v. Fairview*, *supra*, (Appendix E) involved the dismissal of a state employee. The employee in *Tupper* had been denied predismissal procedural protections, but had been given a full evidentiary *de novo* hearing before the Public Employes' Relations Board (P.E.R.B.) after dismissal. The Oregon Court of Appeals held that the P.E.R.B. hearing had supplied the necessary due process and affirmed the dismissal. It further held that the employee was entitled to back pay only for that period between the dismissal and the hearing. However, the court found that the legislative grant of authority to the P.E.R.B. did not permit it to make such an award, and that the employee had to pursue other remedies. *Tupper v. Fairview Hospital*, 22 Or. App. 523, 536-537, 540 P.2d 401 (1975).

There was no contention by the employee in *Tupper*, with regard to the post-termination P.E.R.B. hearing, that he had insufficient notice of the issues, that he was not permitted to put on evidence or cross examine witnesses, or that the issues were not fully litigated. The Oregon Court of Appeals specifically found that the P.E.R.B. order affirming the decision to dismiss was based upon reliable, probative and substantial evidence. 22 Or. App. at 527, n. 1. The

Oregon Supreme Court did not disturb or question that finding. There was no suggestion that the dismissal was not fully warranted. Nevertheless, the Oregon Supreme Court set aside the dismissal. The court found that the employee was dismissed without procedural due process and that the dismissal, therefore, was invalid.

> "Since none of these safeguards [pretermination procedures] were provided, we find that the procedures employed did not comply with the Due Process Clause of the Fourteenth Amendment and that Tupper's dismissal on August 2, 1974, was invalid." 276 Or. at 665, 556 P.2d at 1344.

The court then set out the appropriate remedy.

> "Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated." 276 Or. at 665, 556 P.2d at 1344-1345. (Footnote omitted.)

*Accord Hammer v. O.S.P.*, *supra*.

In a footnote to this quoted passage, the *Tupper* court explained its action. It acknowledged that the P.E.R.B. had no authority to issue an order of reinstatement and back pay but concluded:

> "The constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made." 276 Or. at 665, n. 5.

The *Tupper* court's conclusions conflict in principle with United States Supreme Court cases and are

in direct conflict with United States Courts of Appeal decisions interpreting the federal constitution.

In *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court stated, *in dicta*, that a dismissed employee is not entitled to reinstatement because of a procedural violation. Rather, the employee is entitled to appropriate procedures. In *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court held that an employee, dismissed in part because of his exercise of first amendment rights, is not entitled to reinstatement if the dismissal would have occurred in the absence of the constitutional violation for independent, justifiable reasons. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court held that two students, suspended from school without due process, were not entitled to damages caused by the suspension if the suspensions were warranted, but only to damages, if any, caused by the procedural violation. The holdings of the Oregon Supreme Court in *Tupper* and *Hammer*, relied on by the Oregon Court of Appeals in this case, violate every principle established by these cases.

The Oregon Supreme Court cases are in direct conflict with several United States Circuit Courts of Appeal which have held that public employees, dismissed without proper procedural safeguards, are not entitled to reinstatement and back pay unless

the dismissal would not have occurred but for the procedural violations. In each case, the court upheld the dismissal. *See, e.g.*, *Vanelli v. Reynolds*, 667 F.2d 773 (9th Cir. 1982); *Burt v. Able*, 585 F.2d 613 (4th Cir. 1978).

The anomalous result reached by the Oregon Supreme Court in *Tupper* came about because of its conclusion, based on *Arnett v. Kennedy*, 416 U.S. 134 (1974), that the due process clause requires specific predismissal procedural safeguards in the context of a dismissal of a public employee. As a statement of what due process requires prospectively, the Oregon Supreme Court's holding appears to be substantially correct. However, in viewing a specific dismissal process retrospectively, the court failed to look at the entire process to see if the employee had actually received appropriate due process safeguards. Instead, the court looked at a particular aspect of the process in isolation, found it defective, and invalidated the dismissal. We submit that this rigidly mechanical scheme of analysis distorts the broad meaning of the due process guarantee.

This case presents an opportunity for this Court to hold directly that when a dismissal of a public employee is sustained after the full panoply of procedural rights is afforded, the employee has received due process as to his dismissal even if a particular aspect of the process could be considered

defective when viewed prospectively and in isolation. Such a holding would not preclude the recovery of any damages actually caused by the procedural defect in an appropriate action for damages. It would preclude reinstatement and back pay where the defective procedure was not a *sine qua non* of the dismissal.

The grossly disproportionate remedy awarded in this case is not mandated by the federal constitution. Such a sweeping remedy produces an unwarranted windfall to the employee and an unnecessary injury to the public interest. Whether or not the predismissal notice was defective, the employee in this case received an utterly fair and complete hearing on all questions of disputed fact. The federal constitution does not and should not require more.

**A. The Oregon Supreme Court decisions conflict in principle with United States Supreme Court cases.**

As early as *Perry v. Sindermann*, 408 U.S. 593 (1972), the United States Supreme Court recognized that an employee, ultimately shown to have been dismissed for cause, is not entitled to reinstatement. Having found that the employee in that case had plead facts sufficient to show a "property interest," the Court remanded for an adjudication of that issue. However, the Court pointed out that:

> "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

It is a well-settled principle that any remedy or sanction for a violation of constitutional rights should be related to the particular right violated and addressed only to the extent of the injury. *See Chapman v. California*, 386 U.S. 18 (1967); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Lyons v. Oklahoma*, 322 U.S. 596 (1944). This principle of proportional constitutional remedy was fully developed in the context of an employee dismissal proceeding in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

In *Doyle*, a teacher was dismissed after several disruptive incidents occurred at a school and after the teacher engaged in a communication with a radio station. The district court held that the communication was protected by the First Amendment of the United States Constitution and that it was an impermissible basis for the dismissal. The district court also found that the communication played a "substantial part" in the decision to dismiss, but suggested that the decision would have been the same even if the protected activity had not occurred. This Court indicated that if the dismissal was justified, independently of any consideration of

the protected activity, and the employer would have taken the same action even if the protected activity had not occurred, the constitutional violation was not a *sine qua non* of the dismissal. Under these circumstances, no remedial action is warranted. The Court framed the issue as follows:

> "* * * We are thus brought to the issue whether, even if [the employer would have taken the same action in the absence of the protected activity], the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not." 429 U.S. at 285.

The reason for the Court's conclusion was its concern that if remedial action were taken every time a constitutional violation occurred, an employee could be placed in a better position as a result of engaging in protected activity than he would have occupied had such activity not occurred. *Id.* The Court noted that in other areas of constitutional law, it had found it necessary to develop a test of causation which distinguishes between a result caused by a constitutional violation and one caused by something else. 429 U.S. at 286. The Court concluded that an appropriate remedy is one which:

> "* * * protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to assurance of those rights." 429 U.S. at 287.

In the context of that case, the Court formulated the rule as follows:

> "* * * The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-286.

The analogous rule in the context of procedural due process violations would provide that the constitutional principle at stake is sufficiently vindicated if an employee is placed in no worse a position than if the constitutional violation had not occurred. In other words, the employee is entitled to remedial action only for any injury caused by the constitutional violation.

These principles were adopted in the due process context in *Carey v. Piphus*, 435 U.S. 247 (1978), a civil rights action under 42 U.S.C. § 1983 involving the suspension from school of two students. In unrelated incidents, the two plaintiffs were suspended from school without a hearing. In its discussion of remedy, the Court recognized that Congress did not directly address the question of damages under § 1983. As a result, the Court drew upon and expanded existing principles governing remedies for constitutional violations.

> "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests and their contours are shaped by the interests they protect.

"* * * * *

"In order to further the purpose of section 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." 435 U.S. at 254.

The Court analyzed the due process clause as follows:

"This Clause 'raises no impenetrable barrier to the taking of a person's possessions,' or liberty, or life. *Fuentes v. Shevin*, 407 U.S. 67, 81, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). Procedural due process rules are meant to protect persons not from the deprivations, but from the mistaken or unjustified deprivations of life, liberty, or property." 435 U.S. at 259.

The Court then went on to hold that the students could not recover damages resulting from a justified suspension merely because of procedural violations.

"In this case, the Court of Appeals held that if Petitioners can prove on remand that '[respondents] would have been suspended even if a proper hearing had been held,' * * * then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspension. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of suspensions. * * * The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. * * * We do not understand the parties to disagree with this conclusion. Nor do

> we." 435 U.S. at 260. (Citations and footnote omitted).

The Court further held that while damages for injury actually sustained as a result of the procedural violation could be recovered, injury would not be presumed. Substantial damages cannot be awarded in the absence of proof of actual injury. However, because the right to due process is absolute, the Court authorized the award of $1 in nominal damages.

As these cases demonstrate, when a dismissal is sustained on the merits, reinstatement and back pay cease to be an appropriate remedy for a procedural violation. This result follows because the dismissal is not caused by the constitutional violation. The Oregon Supreme Court's holdings in *Tupper* and *Hammer* directly conflict with the principles established in these cases.

**B. The Oregon Supreme Court cases conflict directly with United States Circuit Courts of Appeals cases.**

In *Vanelli v. Reynolds*, 667 F.2d 773 (9th Cir. 1982), the most recent Ninth Circuit case on the scope of remedy for predismissal procedural defects, the court relied on *Carey* to hold that only such injury as is attributable to the procedural defects is compensable, not the injury resulting from a justified dismissal.

*Decker v. North Idaho College*, 552 F.2d 872 (9th Cir. 1977), involved a discharge of a college instructor without a hearing. The instructor filed an action in federal court for reinstatement and back pay. In lieu of remanding the case to the employer for a hearing, the district court, with the consent of the parties, held a trial on the merits of the discharge, two years after the discharge. The district court held that the employee had a property interest in the job and that the dismissal without a hearing was a denial of due process. However, the district court sustained the discharge. The instructor appealed contending that reinstatement and full pack pay were required where the college failed to hold a hearing. The Ninth Circuit rejected his contention and affirmed the district court's decision. The court had no trouble sustaining the dismissal:

> "The district court trial more than adequately compensated for the fact that the appellant did not receive a pre-termination hearing; he there was accorded the complete panoply of procedural rights." 552 F.2d at 874.

Similarly, in *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976), a *de facto* tenured instructor was not retained after he was given inadequate notice. Subsequently a *de novo* trial in the federal district court was held in which she received "the complete panoply of procedural rights." The district court sustained the decision not to renew. The Ninth

Circuit held that the total procedure, including the intervention by the district court, provided the instructor with substantial due process. Because the dismissal was justified, the instructor was not entitled to reinstatement. As the court recognized, "[E]ven perfect notice before the August hearing would not have helped her to ultimately prevail." 538 F.2d at 248.

*See also*, *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980); *Polos v. United States*, 621 F.2d 385 (Court of Claims 1980); *D'Iorio v. County of Delaware*, 592 F.2d 681 (2nd Cir. 1978); *Burt v. Able*, 585 F.2d 613 (4th Cir. 1978), *Hernandez del Valle v. Santa Aponte*, 575 F.2d 321 (1st Cir. 1978).

The causation analysis adopted by these cases should be applied to this case. As the post-termination hearing clearly established in this case, the inadequate pretermination notice given to the employee did not cause his dismissal. As the Ninth Circuit stated in *Bignall*, even perfect notice would not have helped him to prevail ultimately. The dismissal was caused solely by the employee's conduct. The dismissal is valid, as a matter of federal constitutional law, because the state proved to an independent body, the E.R.B., by competent and persuasive evidence, that the dismissal was justified.

**C. This case presents an important federal question which should be settled by this Court.**

Although the principles established in *Perry*, *Doyle*, and *Carey* strongly suggest the proper resolution of this case, no decision by this Court directly addresses the issue in the context of a public employee dismissed after insufficient predismissal procedural protections. A decision from this Court is necessary to clarify federal constitutional doctrine. This Court should require lower courts considering due process issues to examine the entire process afforded a public employee to determine whether he or she has been given substantial due process. If such a rule of constitutional jurisprudence is not established, the nation's various public employers will be deprived of the opportunity to correct procedural errors occurring during the dismissal process and the Due Process Clause will be distorted by windfall awards to public employees whose misconduct warrants dismissal.

**D. Conclusion**

The Oregon Court of Appeals' decision in this case perpetuates a serious constitutional mistake. The Oregon Supreme Court's prior holding in *Tupper* that the state had denied the employee due process, even though he had been accorded the complete panoply of procedural rights, clearly conflicts with the principles established by this Court in other

contexts and properly applied by the federal circuit courts in the context presented by this case. Oregon cases requiring reinstatement and back pay under these circumstances incorrectly interpret the due process clause of the federal constitution. However, no decision of this Court directly so holds. For these reasons, a writ of certiorari should issue to permit review by this Court of the judgment and opinions of the Oregon appellate courts.

Respectfully submitted,

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## APPENDIX A

No. 745 December 29, 1982 165

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PAYNE,
*Respondent,*
*v.*
DEPARTMENT OF COMMERCE,
*Petitioner,*
EMPLOYMENT RELATIONS BOARD,
*Respondent.*

(No. 1294, CA A24178)

Judicial Review from Employment Relations Board.

Argued and submitted November 19, 1982.

Christine L. Dickey, Assistant Attorney General, Salem, argued the cause for petitioner. With her on the brief were Dave Frohnmayer, Attorney General, Stanton F. Long, Deputy Attorney General, and William F. Gary, Solicitor General, Salem.

David Allen Filer, Salem, argued the cause for respondent Tommy G. Payne. On the brief was Harold W. Adams, Salem.

J. Michael Alexander, Salem, argued the cause for respondent Employment Relations Board. With him on the brief was Brown, Burt, Swanson, Lathen & Alexander, Salem.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

GILLETTE, P. J.

Affirmed.

GILLETTE, P. J.

Petitioner seeks reversal of the Employment Relations Board's (ERB) invalidation of petitioner's dismissal of its employe, Payne.[1] ERB based its decision on its conclusion that petitioner's pre-termination notice to Payne violated a state personnel rule, Rule 81-605, and that that violation invalidated Payne's subsequent dismissal. Petitioner contends that ERB erred in three respects: (1) the pre-termination notice was sufficient to comply with the rule; (2) even if the notice was insufficient, any such error on petitioner's part was cured by the full and fair post-termination hearing accorded Payne; and (3) in any event, the remedy ordered by ERB—reinstatement—exceeded ERB's authority. For reasons that differ somewhat from those advanced by ERB, we affirm its order.

Payne was employed by petitioner as a Plumbing Inspector in the Building Codes Division. His primary duty was to inspect recreational vehicles, either during the manufacturing process or on dealer lots, for plumbing, electrical and mechanical code compliance. To perform his duties, he traveled statewide in a state vehicle from manufacturer to manufacturer, making inspections as necessary. There are approximately 23 manufacturers, many of whom Payne was required to contact at least once a month. As an inspector, he had authority to approve or reject plans on the basis of code compliance.

Petitioner had a written conflict of interest policy, which was issued in June, 1977. The policy stated, in relevant part:

> "(4) 'Potential conflict of interest' means any transaction where a person acting in a capacity as a public official takes any action * * * the effect of which would be to the person's private pecuniary benefit. * * *" *See also* ORS 244.040.

Petitioner's policy also prescribed a procedure for handling potential conflicts:

> "(1) When involved in a potential conflict of interest, a public official shall:

[1] Payne is a respondent in this case, as is ERB. All parties have briefed the matter, but Payne's brief is of no assistance. Because there are multiple respondents, we use the designations "Payne" and "ERB."

"* * * * *

"(d) [n]otify in writing the person who appointed him to office of the nature of the potential conflict, and request that the appointing authority dispose of the matter. * * *"

A statement filed by petitioner with the Oregon Ethics Commission characterizes petitioner's philosophy toward conflicts of interest:

"It is the policy of the Department that, in the area of real or potential conflicts of interest, the employes not only be clean, but look clean."

Petitioner's statement enumerated as an example of a prohibited conflict the following:

"No employe shall voluntarily enter into any transaction or business relationship with a regulated person if that regulated person has any discretionary power in regard to the terms or conditions of the transaction unless the employe has the written permission of the Director. This paragraph does not apply to the purchase of goods or services from a regulated person at the prevailing posted terms and price (whether set in terms of dollars or percentage of value) when such terms and price are not subject to negotiation."

Payne received a copy of the written conflict of interest policy shortly after he was hired. He acknowledges that, at the time of the incident in question, he understood the policy.

Payne also had specific knowledge of petitioner's policy with respect to potential conflicts of interest because of certain incidents that had occurred before the one involved here. In 1978, he had transported another employe to a regulated industry where that employe purchased a recreational vehicle. Although petitioner's investigation revealed no intentional wrongdoing on Payne's part, he was counseled to avoid engaging in business transactions with regulated persons and to report immediately any potential conflict of interest dealings. On another occasion involving the attempted purchase of a damaged vehicle and some jacks from a surplus dealer, he was again counseled to avoid business transactions with regulated industries.

During 1980, Payne acquired two damaged propane tanks from a regulated business, Caribou Manufacturing. The propane tanks were surplus stock that Caribou

was selling at a reduced price. Payne paid $10 apiece for the tanks. The price of $10 was not in fact negotiated; however, the price was not posted and was negotiable. Shortly thereafter, Payne approached the owner of U. S. Cruiser, another regulated business, and offered to sell him the propane tanks for $50 apiece. The offer was accepted. Payne also asked the owner whether he was interested in carpeting, thus suggesting Payne had some available. No carpet was purchased.

Payne also talked to other regulated persons about buying propane tanks in late 1980 (after he had purchased several more tanks from Caribou Manufacturing at the same price), including conversations with the management of Pacific Remanufacturing, another regulated entity. On the first such occasion, Payne approached the company's assistant manager and asked whether he was interested in propane tanks. Payne indicated that he had tanks available for sale at $50 apiece. On the second occasion, Payne showed the assistant manager of Pacific Remanufacturing some carpet samples and indicated that carpet was available for $5 a yard. He did not indicate that it was available from Caribou, but as a practical matter the assistant manager knew that the carpet was part of Caribou's closeout sale. The assistant manager of Pacific Remanufacturing was not interested, and no sales were consummated.

Payne also contacted Ralph Hildula, the owner of Vandicraft, Inc., another regulated entity. He told Hildula that he had "propane tanks and other merchandise" available at a good price. When asked by Hildula where the merchandise came from, Payne replied that they were available through him. No sale occurred. On still another occasion, Payne offered propane tanks for sale to Bob Magid of the Rough Rider Company, another regulated business. Magid, however, felt that Payne was not, by offering the item for sale, attempting to use his position for personal gain.

In the course of engaging in the foregoing transactions and contacts, Payne transported items such as propane tanks and carpet samples in the trunk of his state car. He did not reveal the transactions to his superiors.

The sales and attempted sales came to petitioner's attention, and an investigation was conducted. Payne was suspended pending pre-dismissal process on April 29, 1981. By letter of the same date, petitioner notified Payne of the charges against him but did not divulge the source of its information, the identity of the persons he had allegedly contacted, the dates involved or the kind of material allegedly sold or offered for sale. During his pre-dismissal hearing Payne was given an opportunity to "respond" to the charges but was not given any more specifics about the complaints against him. Petitioner's refusal to divulge specifics of the complaints was based on advice of counsel. At the hearing, Payne repeatedly complained about the lack of specifics in the notice, stating that he could not answer the charges without more information. When questioned during the hearing about selling any merchandise to regulated persons or businesses, he denied that he had done so. With respect to his dealing with Caribou Manufacturing, Payne acknowledged only purchasing two tanks, both of which he said he kept for personal use.

The pre-termination notice to Payne on April 29, 1981, provided, in pertinent part:

> *"Charges and Complaints:* 1. Approximately one year ago you obtained recreational vehicle-related merchandise either by purchase, consignment or other type of receipt. 2. You attempted to sell recreational vehicle merchandise, while performing your inspection duties, on at least four occasions to various R.V. businesses inspected by you in the normal course of your duties. 3. You also transported this merchandise in the trunk of your State car on at least one of these four occasions. 4. You have concealed from your supervisors the fact that you engaged in business transactions with such regulated business firms or plant owners; that you offered the merchandise for sale during work hours and on State travel status; and that you were transporting some of this merchandise in a State car. 5. You failed to report your potential conflict of interest."

ERB found that this pre-termination notice was insufficient to comply with Personnel Division Rule No. 81-605:

> "A written pre-dismissal notice shall be given to a regular status employe against whom a charge is presented. Such notice shall include the known complaints,

> facts and charges and a statement that the employe may be dismissed. The employe shall be afforded an opportunity to refute such charges or present mitigating circumstances to the appointing authority or his designee * * *."

Petitioner argues in this court that the notice was sufficient. We agree with ERB.

Because of the variety of circumstances that can lead to the dismissal or proposed dismissal of a regular status employe, it is obvious that the required degree of specificity of a notice will vary considerably according to circumstances. However, because the rule specifically contemplates that the "employe shall be afforded an opportunity to refute such charges," it necessarily contemplates that the employe will be given sufficient information so that he can know precisely what it is he will need to refute in order to avoid potential employer action against him, including dismissal. We hold that the rule requires that the employe be informed in the pre-termination notice of each material fact then in the knowledge of the employer that is a part of the basis for the employer's decision to consider termination or other appropriate personnel action. This means that, at a minimum, when the charges against the employe arise out of particular unlawful or otherwise improper acts by the employe, those acts must be described with sufficient particularity to enable the employe to identify and respond to them. That will usually require that the employe be notified of the dates in question, the alleged improper acts and the other persons (if any) involved.[2]

Examined in light of the foregoing, the pre-termination notice given to Payne is clearly insufficient. It does in general terms notify him of the charges against him, but it does not identify the dates when the alleged wrongful acts were supposed to have occurred, the persons and regulated industries that Payne is supposed to have contacted, or the kinds of materials allegedly sold or

---

[2] We believe the foregoing formulation is more specific than, but not in principle different from, ERB's own explanation of the rule:

> "As a general matter, * * * we can say that if the nature of the information is such that to withhold it would be likely to significantly diminish or impair the employe's ability to *refute* the charges or *offer mitigation*, then the information must be included in the notice." (Order of ERB at 7; emphasis in original.)

offered for sale. It follows that ERB's conclusion that the pre-termination order violated the requirements of Rule 81-605 was correct.

Petitioner next contends that, if Rule 81-605 was violated by the form of pre-termination notice, the violation was "cured" by the extensive post-termination hearing afforded Payne, at which he was fully apprised of all of the specifics of the charges against him and was given a complete opportunity to refute them. In making this argument, petitioner relies on our decision in *Ashman v. Children's Services Division*, 37 Or App 865, 588 P2d 665 (1978). In *Ashman*, we said with respect to another, related personnel division rule:

> "* * * [W]e fail to see how the defects in procedure, if any, under [the analogous rule] prejudice defendant when he was accorded a full evidentiary hearing before ERB after his dismissal. *See Arnett v. Kennedy*, 416 US 134, 170, [94 S Ct 1633,] 40 L Ed 2d 15, 42 (1974). A procedural defect which does not prejudice substantial rights of petitioner is not cause for reversal. ORS 183.482(8)(a)." 37 Or App ____. (Footnote omitted.)

Although our ruling on the issue in *Ashman* was correct, its statutory citation was wrong. Former ORS 183.482(8)(a),[3] the statute relied on in *Ashman*, was a section of the Administrative Procedure Act governing review *by this court* of contested case decisions of agencies. It provided:

> "(8) The court may affirm, reverse or remand the order. *The court shall reverse or remand the order only if it finds:*
>
> "(a) The order to be unlawful in substance or procedure *but error in procedure shall not be cause for reversal or remand unless the court shall find that substantial rights of the petitioner were prejudiced thereby* * * *." (Emphasis supplied.)

What we failed to do in *Ashman* was to differentiate *our* role in reviewing an agency decision—in that case, also, a decision of ERB—and ERB's role in reviewing another administrative agency's decision to dismiss a regular status

[3] Former ORS 183.482(8)(a) has since been amended; its substance is now found in ORS 183.482(7).

employe. That is, the standard of review by which we purported to analyze the *Ashman* case was one that was applicable only to our review of ERB's action, but we applied it as if it also were an enunciation of the standard by which ERB should have reviewed the other agency's action.

Rather than conducting our review in *Ashman* under the emphasized portion of former ORS 183.482(8)(a), we should, instead, have reviewed it under other language of the same section:

> "* * * [T]he court shall reverse or remand the order only if it finds:
>
> "(a) The order to be unlawful in substance or procedure * * *."

To determine whether or not the order was unlawful "in substance," this court should have referred to the organic statute under which ERB purported to act. The latter former ORS 240.560,[4] provided:

> "(1) A regular employe who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the board * * *.
>
> "(2) The hearing shall be conducted as provided for a contested case in ORS 183.310 to 183.550.
>
> "(3) If the board finds that the action complained of was taken by the appointing authority for any political, religious or racial reasons, or because of sex, marital status or age, the employe shall be reinstated to his position and shall not suffer any loss in pay.
>
> "(4) In all other cases, *if the board finds that the action was not taken in good faith for cause,* it shall order the immediate reinstatement and the reemployment of the employe in his position without the loss of pay. The board in lieu of affirming the action, may modify it by directing a suspension without pay for a given period, and a subsequent restoration to duty, or a demotion in classification, grade or pay. * * *" (Emphasis supplied.)

Both *Ashman* and this case were cases considered under subsection (4) of ORS 240.560. As we read the operative language, ERB may set aside or otherwise modify a

[4] The statute was twice amended in 1977, but neither amendment affected the provisions pertinent to the *Ashman* case or to our consideration here.

personnel action only if it finds that the action was not taken "in good faith for cause." In making this determination, it is self-evident that procedural errors in the agency's handling of dismissal do not, *a fortiori*, having anything to do with that question. In fact, there was no suggestion in *Ashman* and there is no suggestion in this case, that the failure to comply with particular personnel rules was a reflection of any bad faith on the part of the employing agency. Thus, our quoted statement in *Ashman*, 37 Or App at 872-73, should have concluded with the following sentence:

> "A procedural defect that does not prejudice substantial rights of petitioner is not a basis on which ERB or this court could set aside a dismissal, because the organic statute of ERB does not authorize such a disposition. ORS 240.560(4)."

In setting aside the dismissal on the basis of violation of a rule in the present case, ERB noted in footnote 22 of its opinion:

> "Our conclusions on the notice issue may well exalt form over substance. Mr. Payne clearly admitted the acts complained of, and just as clearly those acts warrant dismissal. Moreoever, it is difficult to see how Payne was actually harmed by respondent's failure to provide more specific notice (*i.e.*, comply with the rule). * * * Nevertheless, we do not believe that noncompliance with a rule intended to afford 'due process' notice can be ignored on the basis that such noncompliance was ultimately shown to be prejudicial. * * *" (Citations omitted.)

As a matter of policy, ERB's statement may or may not have been correct; we are not called to pass on that question. What it failed to observe, however, was the limitation on its own authority. An agency may not act outside its statutory authority. *Board of Comm. of Clackamas County v. LCDC*, 35 Or App 725, 582 P2d 59 (1978). ERB is not statutorily authorized to set aside a dismissal for failure of the dismissing agency to comply with a personnel rule. Therefore, its action here, on the basis it asserted, was outside its authority and improper. There remains, however, the question of whether the action may be sustained on another ground.

Payne asserted before the Board that the pre-termination notice he received denied him his right to due process under the Fourteenth Amendment to the United States Constitution, relying on *Hammer v. OSP*, 276 Or 651, 556 P2d 1348 (1976), *vacated* 434 US 945, 98 S Ct 469, 54 L Ed 2d 306 (1977), *aff'd on remand* 283 Or 369, 583 P2d 1136 (1978), and *Tupper v. Fairview Hospital*, 276 Or 657, 556 P2d 1340 (1976). The issue before the Oregon Supreme Court in *Tupper* and *Hammer* cases was the kind and extent of pre-termination notice required before a regular status public employe can be terminated. The court considered the rules enunciated in a number of cases, and particularly those in *Arnett v. Kennedy, supra,* and *Mathews v. Eldridge*, 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976). In *Tupper*, the court said:

> "* * * Therefore, on the basis of *Arnett v. Kennedy, supra,* and in view of the competing interests involved in these cases, we conclude that in addition to his full post termination hearing Tupper was entitled to the following procedural safeguards prior to his dismissal. First, he should have been notified of the charges against him. Second, he should have been informed of the kinds of sanctions being considered. Third, he should have been given at least an informal opportunity to refute the charges either orally or in writing before someone who is authorized either to make the final decision or to recommend what final decision should be made." 276 Or at 665. (Footnote omitted.)

We explained the meaning of the *Tupper* and *Hammer* decisions in *Ashman v. Children's Services Division, supra:*

> "* * * All that *Tupper* and *Hammer* require is that an employee receive notice of the charges, notice of the possible sanctions and, at minimum, an informal opportunity to respond to the charges prior to dismissal. * * * In its simplest form, the employee is to be informed of the charges and given the chance to say 'I did not do that.' * * *" 37 Or App at 872.

A fair reading of the pre-termination notice given to Payne in this case shows that the charges against him were not sufficiently spelled out so that he might be prepared even to say, "I did not do that." Without some knowledge of the dates and parties involved and the kind of inappropriate activity in which he is suppose to have

engaged, Payne could not have stated "I did not do that" with any certainty. We hold that the pre-termination notice given to Payne in this case did not comply with the due process requirements enunciated in *Tupper* and *Hammer* and explained in *Ashman*. Under such circumstances, the appropriate disposition of the case is to set aside the dismissal, precisely the action which the ERB took in this case. *Hammer v. OSP, supra,* 276 Or at 655; *Tupper v. Fairview Hospital, supra,* 276 Or at 665.

Affirmed.

## APPENDIX B



IN THE COURT OF APPEALS OF THE
STATE OF OREGON

PAYNE,
*Respondent,*
*v.*
DEPARTMENT OF COMMERCE,
Building Codes Division,
*Petitioner,*
EMPLOYMENT RELATIONS BOARD,
*Respondent.*

(1294; CA A24178)

Judicial Review from Employment Relations Board.

On respondent Employment Relations Board's petition for reconsideration filed January 26, 1983, and petitioner Department of Commerce's petition filed on February 28, 1983. Former opinion filed December 29, 1982, 61 Or App 165, 656 P2d 361 (1982).

J. Michael Alexander and Brown, Burt, Swanson, Lathen, Alexander & McCann, Salem, for petition for Employment Relations Board.

Dave Frohnmayer, Attorney General, Stanton Long, Deputy Attorney General, William F. Gary, Solicitor General, Christine L. Dickey, Assistant Attorney General, and Jan Peter Londahl, Assistant Attorney General, Salem, for petition for Department of Commerce.

GILLETTE, P. J.

Petitions for reconsideration granted; former opinion adhered to.

**GILLETTE, P. J.**

Petitioner Employment Relations Board (ERB) seeks Supreme Court review of our decision in this case, *Payne v. Department of Commerce,* 61 Or App 165, 656 P2d 361 (1982), on the ground that, while it may be correct in result, the opinion misstates the extent of the ERB's authority to review personnel actions of state agencies. Petitioner Department of Commerce, Building Codes Division (Division), also seeks Supreme Court review of our decision, asking (1) clarification of our opinion as it affects ERB's authority to review personnel actions, (2) reversal of our holding that the Division's pre-termination notice was insufficient to meet the requirements of due process and (3) reconsideration of the cases on which this court relied in determining the extent of the improperly terminated employe's remedy. We treat both petitions as seeking reconsideration. ORAP 10.10. We grant both and adhere to our former opinion.

The facts underlying this case are adequately stated in our previous opinion. We there held that Payne's dismissal from the classified service was constitutionally improper due to inadequate notice of the charges against him. In so holding we affirmed an ERB ruling that achieved the same result, but we specifically rejected the Board's rationale, *i.e.,* that the dismissal must be set aside because the notice was inadequate to meet the requirements of a personnel rule. We said:

> "In setting aside the dismissal on the basis of violation of a rule in the present case, ERB noted in footnote 22 [(actually, as the ERB points out, footnote 20)] of its opinion:
>
> "'Our conclusions on the notice issue may well exalt form over substance. Mr. Payne clearly admitted the acts complained of, and just as clearly those acts warrant dismissal. Moreover, it is difficult to see how Payne was actually harmed by respondent's failure to provide more specific notice (*i.e.*, comply with the rule). * * * Nevertheless, we do not believe that noncompliance with a rule intended to afford "due process" notice can be ignored on the basis that such noncompliance was ultimately not shown to be prejudicial. * * *' (Citations omitted.)

> "As a matter of policy, ERB's statement may or may not have been correct; we are not called to pass on that question. What it failed to observe, however, was the limitation on its own authority. An agency may not act outside its statutory authority. *Board of Comm. of Clackamas County v. LCDC,* 35 Or App 725, 582 P2d 59 (1978). ***ERB is not statutorily authorized to set aside a dismissal for failure of the dismissing agency to comply with a personnel rule.*** Therefore, its action here, on the basis it asserted, was outside its authority and improper. There remains, however, the question of whether the action may be sustained on another ground." 61 Or App at 174. (Emphasis supplied.)

It is the emphasized portion of the foregoing quotation which ERB challenges and the Division asks be clarified.

An agency may only act within the scope of its statutory authority. *Sunshine Dairy v. Peterson,* 183 Or 305, 193 P2d 543 (1948); *Clackamas County v. LCDC, supra.* ERB's authority to review personnel actions such as Payne's dismissal is found in ORS 240.560, which provides, in pertinent part:

> "(1) A regular employe who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the board * * *.
>
> "(2) The hearing shall be conducted as provided for a contested case in ORS 183.310 to 183.550.
>
> "(3) If the board finds that the action complained of was taken by the appointing authority for any political, religious or racial reasons, or because of sex, marital status or age, the employe shall be reinstated to his position and shall not suffer any loss in pay.
>
> "(4) In all other cases, ***if the board finds that the action was not taken in good faith for cause,*** it shall order the immediate reinstatement and the reemployment of the employe in his position without the loss of pay. The board in lieu of affirming the action, may modify it by directing a suspension without pay for a given period, and a subsequent restoration to duty, or a demotion in classification, grade or pay. * * *" (Emphasis supplied.)

In our original opinion in this case, we concluded that the emphasized language of ORS 240.560(4) was not so broad as to permit setting aside a dismissal for violation of a personnel rule. 61 Or App at 173-74. In other words, we held that the failure to conform Payne's pretermination

notice to the requirements of Personnel Rule 81-605 could not serve as a basis for a finding that the challenged personnel action "was not taken in good faith for cause." ERB urges that this conclusion reads its authority too narrowly. It argues:

> "As ERB argued to the Court of Appeals, its action in this case was taken pursuant to both ORS 240.086(1) and 240.560. In particular, the former statute states that one of the duties of the Board shall be to
>
> > "'(r)eview any personnel action affecting an employee * * * that is alleged to be contrary to *rule* or law, * * * and *set aside* such action if it finds these allegations to be correct.' (Emphasis added)
>
> "In this case both the Board and the Court of Appeals found that the pre-dismissal notice violated a specific Personnel Division rule. Therefore, ERB was not only authorized but also directed to set aside the action taken by the Department of Commerce. The Court of Appeals was clearly wrong in stating that no such statutory authority existed, a decision at odds with its prior opinion in *Paul v. Personnel Div.*, 28 Or App 603, 608, 560 P2d 293 (1977).
>
> "In addition, ORS 240.560, when properly read in conjunction with ORS 240.086(1) and pertinent case law, supports ERB's position. ORS 240.560(4) authorizes the Board to reinstate a dismissed employee if the employer's '* * * action was not in good faith for cause * * *.' 'Cause', as used in such statute, means '* * * sufficient cause proven upon a hearing *after reasonable notice.*' Therefore, in a case such as this, where a rule is violated which realates to notice required prior to dismissal, the employer would thereafter lack sufficient cause for its action, and ERB could set aside such action and reinstate the employer [sic] pursuant to both 240.086(1) and 240.560(4), if not under either." (Footnotes omitted.) (Emphasis in original.)

The statute on which ERB relies for its authority in this case is ORS 240.086(1), which provides:

> "The duties of the board shall be to:
>
> "(1) *Review any personnel action affecting an employe,* who is not in a certified or recognized appropriate collective bargaining unit, *that is alleged to be* arbitrary *or contrary to law or rule,* or taken for political reason, and set aside such action if it finds the allegations to be correct.
>
> "* * * * *" (Emphasis supplied.)

ORS 240.086(1) is a broadly-stated statutory direction to ERB to ensure adherence to the full range of personnel rules which apply to the testing, selection and promotion of employes in the classified service. *See, e.g., Paul v. Personnel Div.*, 28 Or App 603, 560 P2d 293 (1977) (review of Personnel Division's placement of an applicant for state employment on an eligibility list). On the other hand, ORS 240.560(4)—the statute which specifically authorized ERB's review of this dismissal—is a specific statute of more limited scope. Assuming (without deciding) that a termination is a "personnel action affecting an employe" under ORS 240.086(1), we nonetheless conclude that the more specific statute (ORS 240.560(4)), including the remedies it provides, governs over the general.[1] *See* ORS 174.020.

Our disposition of ERB's argument also adequately addresses the Division's arguments on the same subject. We turn to the Division's two remaining points.

The Division argues that we erred in our holding that its pre-termination notice to Payne was insufficient to comply with the requirements of due process. We adhere to the view expressed in our former opinion.

Finally, the Division argues that, with respect to the scope of the *remedy* to which an improperly-terminated member of the classified service is entitled, the two principal Oregon Supreme Court cases upon which we relied in our former opinion — *Hammer v. OSP*, 276 Or 651, 556 P2d 1348 (1976), *vacated* 434 US 945, 90 S Ct 469, 54 L Ed 2d 306 (1977), *aff'd on remand* 283 Or 369, 583 P2d 1136 (1978) and *Tupper v. Fairview Hospital*, 276 Or 657, 556 P2d 1340 (1976)—are wrongly decided. We agree—but there just is nothing that this court can do about that. The Division's argument on this score is commended to the attention of the Supreme Court.

Petitions for reconsideration granted; former opinion adhered to.

---

[1] ERB itself appears to recognize the correctness of our holding because, as noted above, it attempts to read the phrase "contrary to the rule or law" in ORS 240.086(1) into the word "cause" in ORS 240.560. Were we to do that, we would be rewriting the statute. If ERB wants this broader authority under ORS 240.560, it must apply to the legislature.

## APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OREGON

| | | |
|---|---|---|
| TOMMY G. PAYNE, | ) | |
| Respondent, | ) | AMENDED |
| vs. | ) | ORDER |
| | ) | |
| DEPARTMENT OF COMMERCE, BUILDING CODES DIVISION, | ) | |
| Petitioner, | ) | CA A24178 |
| | ) | SC 29382 |
| EMPLOYMENT RELATIONS BOARD, | ) | |
| Respondent. | ) | |

This matter is before the court upon petitioner's (Department of Commerce) petition for review of the decision of the Court of Appeals in the above-entitled cause.

IT IS HEREBY ORDERED that the petition for review is denied.

DATE: November 1, 1983.

[Signature omitted in printing.]

# APPENDIX D

## EMPLOYMENT RELATIONS BOARD

of the

## STATE OF OREGON

Case No. 1294

| | | |
|---|---|---|
| TOMMY PAYNE, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | RULINGS ON MOTIONS. |
| v. | ) | FINDINGS OF FACT. |
| | ) | CONCLUSIONS OF LAW |
| DEPARTMENT OF COMMERCE, BUILDINGS CODES DIVISION, | ) | AND ORDER |
| | ) | |
| | ) | |
| Respondent. | ) | |

Respondent dismissed Appellant for misconduct, malfeasance, insubordination, and unfitness to render effective service. The primary charge against Appellant is that he violated Respondent's conflict of interest policy by covertly engaging in business transactions with companies regulated by Respondent. Appellant admits that he sold a propane tank to a regulatee but denies that he did so as part of a "selling campaign," Accordingly, Appellant denies any wrongdoing. Appellant also asserts bad faith as an affirmative defense. Finally, Appellant contends the dismissal should be overturned because he was not afforded pre-dismissal due process.

Hearings were held by Board Agent George H. Lehleitner, Jr., on July 9, 1981, and July 23, 1981, in Salem, Oregon. Appellant was represented by Harold W. Adams, Attorney at Law; and Respondent was represented by John S. Irvin, Assistant Attorney General.

The Board Agent issued Proposed Rulings on Evidentiary Matters, Findings of Fact, Conclusions of Law and Recommended Order to which both parties filed objections.

The matter came on for argument before this Board on December 8, 1982, in Salem, Oregon. Mr. Adams represented Appellant; and Mr. Irvin represented Respondent.

Having the full record before it, this Board makes the following:

## RULINGS ON MOTIONS

At the commencement of the hearing, Appellant moved to dismiss, i.e. set aside the dismissal action, on the ground (among others) that the charges were "nonspecific." The hearings officer deferred ruling. The motion is disposed of by the Conclusions of Law herein. All other rulings were correct.

## FINDINGS OF FACT

1. At all times relevant to this proceeding, Appellant was employed by Respondent as a Plumbing Inspector in the Building Codes Division.

Appellant was employed in this capacity from approximately January 1978 until his termination. His primary duty was to inspect recreational vehicles in the manufacturing process and also on dealer lots for plumbing, electrical and mechanical code compliance. To perform his duties Appellant traveled statewide in a state vehicle from manufacturer to manufacturer making inspections as necessary. There are approximately 23 manufacturers, many of whom Appellant was required to contact at least once a month. Appellant, as an Inspector, had the authority to approve or reject plans on the basis of code compliance.

2. Respondent has a written Conflict of Interest Policy which was issued in June 1977. The Conflict of Interest Policy, at times quoting from ORS Chapter 244, states in relevant part:

> "244.020 (4) Potential conflict of interest' means any transaction where a person acting in a capacity as a public official takes any action . . . the effect of which would be to the person's private pecuniary benefit. . . ."

The same theme is recited again under ORS 244.040:

> "(1) No public official shall use his official position or office to obtain financial gain for himself. . . ."

A procedure is also prescribed for handling potential conflicts:

"244.120 **Methods of handling potential conflicts** (1) When involved in a potential conflict of interest, a public official shall:

* * *

(d) [n]otify in writing the person who appointed him to office of the nature of the potential conflict, and request that the appointing authority dispose of the matter. . . ."

The statement filed by Respondent Department with the Oregon Ethics Commission characterizes the philosophy of the Department towards conflict of interest situations as follows:

"It is the policy of the Department that, in the area of real or potential conflicts of interest, the employes not only be clean, but look clean."

Finally, Respondent Department's statement enumerates as an example of a prohibited conflict the following:

"No employe shall voluntarily enter into any transaction or business relationship with a regulated person if that regulated person has any discretionary power in regard to the terms or conditions of the transaction unless the employe has the written permission of the Director. This paragraph does not apply to the purchase of goods or services from a regulated person at the prevailing posted terms and price (whether set in terms of dollars or percentage of value) when such terms and price are not subject to negotiation."

Appellant received a copy of the written Conflict of Interest Policy shortly after he was hired and

acknowledged that at the time of the incident(s) in question he understood the policy.

3. Repondent Building Codes Division has for many years emphasized to employes the necessity of avoiding potential conflict of interest situations with regulatees. Specifically, employes including Appellant have been told on numerous occasions that it is a violation of Respondent's Conflict of Interest Policy to sell merchandise to regulated industries. The policy communicated to employes with respect to purchases is less clear but the evidence indicates employes have been told that any transaction in which employes could possibly benefit by reason of their position is violative of the agency's Conflict of Interest Policy. At any rate, it has been stressed to all employes that if there is the slightest hint of a potential conflict of interest, the situation must be reported to the appointing authority for resolution. If the appointing authority feels the transaction is not a violation of the Conflict of Interest Policy he can give the employe permission to proceed.

4. Appellant also has specific knowledge of Respondent's policy with respect to potential conflicts of interest by reason of prior incidents. In 1978, he was involved in an incident in which he took another employe to a regulated industry and that employe purchased a recreational vehicle. Although Respondent's investigation revealed no

intentional wrongdoing on Appellant's part, he was counseled to avoid engaging in business transactions with regulatees and to immediately report any potential conflict of interest dealings. On another occasion involving the attempted purchase of a damaged vehicle and some jacks from a surplus dealer, Appellant was again counseled to avoid business transactions with regulated industries.

5. During 1980, Appellant acquired two damaged propane tanks from a regulatee, Caribou Manufacturing. The propane tanks were surplus stock which Caribou was selling at a reduced price. Appellant paid $10 apiece for the tanks. The price of $10 was not *negotiated*, however, the price was not posted and was *negotiable*. Shortly thereafter, Appellant approached the owner of U.S. Cruiser, another regulatee, and offered to sell him the propane tanks for $50 apiece.1/ The offer was accepted and appellant sold the tanks for the stated price.2/ Appellant also asked the owner whether he was interested in any carpeting, thus suggesting he (Appellant) had some available. No purchase of carpeting was effected.

6. Appellant also talked to other regulatees about buying propane tanks and in fact purchased several more tanks from Caribou Manufacturing at the same price. While the witnesses were unclear about dates, it appears these contacts took place in

the latter part of 1980. Several of these contacts were with the management of Pacific Remanufacturing which is another regulatee. On the first occasion Appellant approached the company's assistant manager and asked whether he was interested in any propane tanks. The indication was that he (Appellant) had the tanks available for sale at $50 apiece. On the second occasion Appellant showed the assistant manager of Pacific Remanufacturing some carpet samples and indicated it was available for $5 a yard. He did not indicate that it was available from Caribou but as a practical matter the assistant manager knew that the carpeting was part of Caribou's closeout sale.3/ The assistant manager of Pacific Remanufacturing was not interested and no sales were consummated.4/ Another contact was made with Ralph Hildula, the owner of Vandicraft, Inc., another regulatee in the business of manufacturing recreational vehicles. Appellant told Hildula he had "propane tanks and other merchandise" available at a good price. When asked by Hildula where the merchandise came from, Appellant replied they were through him. No sale was effected.5/ The credible evidence also indicates that on one occasion, Appellant offered propane tanks for sale to another regulatee, Bob Magid of the Rough Rider Company. Magid, however, felt that Appellant was not, by offering the item for

sale, attempting to use his position for personal gain. Accordingly, he wrote a letter supporting Appellant. In the course of engaging in the above transactions and/or contacts Appellant transported items such as the propane tanks and the carpet samples in the trunk of his state car. He also did not reveal the transactions to his superiors.

7. Also during 1980, another regulatee, Conastoga, Inc., had a closeout sale on a number of R.V. items. The Company's owner published a price list of items for sale. Appellant, in the course of his travels, picked up some copies of the list and left them with other regulatees for their perusal. There was no intent on Appellant's part to profit from this action.

8. The possibility that Appellant had violated Respondent's Conflict of Interest Policy came to management's attention in early 1981, when another inspector reported a conversation he had had with the assistant manager of Pacific Remanufacturing about Appellant's contacts with that firm.6/ Respondent, through Appellant's immediate supervisor, Wes Galloway, conducted an investigation in which he asked regulatees about any attempts to sell them merchandise. In making these inquiries, Galloway did not identify Appellant by name until it was established by the regulatee that he (Appellant) had in fact attempted to sell them merchandise. The

information uncovered by Galloway became the basis for the charges in this case.

9. On April 27, 1981, the Administrator of the Building Codes Division, Trevor Jacobson, and the Section Head, Don Ellingwood [sic], met with Appellant to discuss his interactions with regulatees. Appellant told them that he had purchased two surplus propane tanks from Caribou Manufacturing for a fixed price.7/ In the course of this meeting, Appellant was also asked on a number of occasions whether he had sold or attempted to sell any merchandise to regulatees. He falsely denied every doing so. Appellant did acknowledge in this meeting that he was aware of Respondent's Conflict of Interest Policy and understood it would violate that policy for him to sell or attempt to sell goods to a regulated industry. Appellant did not qualify this understanding. Although Jacobson and Ellinwood questioned Appellant about sales to regulatees they did not specifically charge him with selling nor did they disclose to him the source of their information, the regulatees he allegedly contacted, or the type R.V. materials in question.

10. Appellant was suspended pending pre-dismissal process on April 29, 1981. By letter of the same date Respondent notified Appellant of the charges against him but did not divulge the source of their information, the regulatees Appellant had

allegedly contacted, nor the kind of R.V. material allegedly sold or offered for sale. During the pre-dismissal hearing Appellant was given an opportunity to "respond" to the charges but again he was not given any more specifics about the complaints against him. Respondent's refusal to divulge specifics of the complaints was based on advice of counsel. At the pre-dismissal hearing Appellant repeatedly complained about the lack of specifics in the notice, stating that he could not answer the charges without more information. When questioned during the hearing about selling any merchandise to regulatees Appellant denied that he had done so. Based upon the pre-dismissal transcript we conclude that Appellant was reasonably sure that the charges had to do, at least in part with propane tanks. According to Appellant's "testimony" at the pre-dismissal hearing, he only purchased two tanks from Caribou Manufacturing, both of which he kept for personal use.

11. Appellant has no prior disciplinary record. All indications were that he performed satisfactorily as an inspector.

CONCLUSIONS OF LAW

Respondent proved by a preponderance of the credible evidence all of the charges against Appellant.8/ The charges are sufficiently serious to

warrant dismissal.9/ However, because Respondent failed to comply with the applicable pre-dismissal rule, the dismissal must be set aside.

Appellant contends that the pre-termination process did not provide him with notice of the "known complaints, facts and charges" and that he was therefore denied due process of law. We understand Appellant's position to be that his written pre-dismissal notice lacked sufficient specificity to comply with the requirements of Personnel Division Rule 81-605 and the due process clauses of the state and federal constitutions.10/ Because we view Rule 81-605 as equally or more restrictive of state action than either federal or state constitutions, we need only concern ourselves with whether Appellant received the protections afforded by the rule.

Personnel Division Rule 81-605 states in relevant part:

> "A written pre-dismissal notice shall be given to a regular status employe against whom a charge is presented. Such *notice shall include the known complaints, facts and charges* and a statement that the employe may be dismissed. The employe *shall be afforded an opportunity to refute such charges or present mitigating circumstances* to the appointing authority or his designee. . . ." (Emphasis supplied.)

The relevant portion of Appellant's pre-dismissal notice reads:

> "**Charges and Complaints:** 1. Approximately one year ago you obtained recreational vehicle-

related merchandise either by purchase, consignment or other type of receipt. 2. You attempted to sell recreational vehicle merchandise, while performing your inspection duties, on at least four occasions to various RV businesses inspected by you in the normal course of your duties. 3. You also transported this merchandise in the trunk of your State car on at least one of these four occasions. 4. You have concealed from your supervisors the fact that you engaged in business transactions with such regulated business firms or plant owners; that you offered the merchandise for sale during work hours and on State travel status; and that you were transporting some of this merchandise in a State car. 5. You failed to report your potential conflict of interest."

The question is whether Appellant was entitled under the rule to be apprised of the kind(s) of RV related material, from whom it was allegedly obtained, and to whom it was allegedly sold or offered for sale. We conclude that under the rule Appellant did have the right to this information, and that the pre-termination notice was therefore inadequate.

There is no dispute that Respondent possessed the information at the time of issuance of the pre-dismissal notice and did not divulge it until *after* Appellant's dismissal.11/ The issue is whether the names of the manufacturers and the kinds of materials involved constitute the sort of "acts" contemplated by the notice rule. Obviously, not all information known to the employer need be placed

in the pre-dismissal notice. In many instances, the names of witnesses or the specific date and time of an alleged event would add nothing to the notice.12/ In other cases, however, such information would be indispensible.13/ The kind and amount of information that must be divulged is simply not amenable to precise description. As a general matter, however, we can say that if the nature of the information is such that to withhold it would be likely to significantly diminish or impair the employe's ability to *refute* the charges or *offer mitigation*, then the information must be included in the notice. We view the facts withheld in the present case as constituting that sort of information.14/ Appellant's job required extensive statewide travel in a state vehicle, and involved numerous and repeated contacts and conversations with RV manufacturers. Respondent accused Appellant of unauthorized business dealings during four such conversations sometime a year earlier. Obviously, without the *who* and *what* of the charges, the accused would have little or no chance of guessing which four conversations with which four manufacturers the employer might be referring to — and without that knowledge, the employe has no realistic opportunity to refute the charges or offer mitigation, the stated purpose of Rule 81-605.15/

Respondent argues that the notice was sufficient, particularly in light of Appellant's independent knowledge of the charges, and Respondent's eventual (post termination) disclosure of specifics. In other words, the employer contends that since Appellant was "guilty" of the alleged misconduct, he did not require any more specific notice than he received (the "you-know-who-you-are-and-you-know-what-you-did" theory of notice).

We cannot agree that knowledge will substitute for notice. There is no "forgive" in the language of the rule,16/ and we are not otherwise willing to judge the validity of notice based upon how easily (and/or how well) the accused employe guessed what the employer was referring to in the notice. In any given case, such a construction of the rule could eliminate the need for any notice whatsoever, thus reading part of Rule 81-605 out of existence. Moreover, Appellant's later acquisition of the information is meaningless. The failure to comply with the notice rule cannot be vitiated by the employer's subsequent notice, any more than a full evidentiary hearing before this Board will cure a lack of due process in the pre-termination procedures.17/

Respondent cites authorities for the proposition that constitutional due process (defined for

present purposes by *Tupper v. Fairview*, Case No. 281, 22 Or. App. 523, 540 P.2d 401 (1975); 276 Or. 657 (Nov. '76) only requires notice of sufficient detail to give the accused the chance to say "I did not do that."18/ We do not disagree, but the rule requires more. It requires that the "known" facts be set out in the notice in order to afford the accused not simply an opportunity to *deny* the charges, but an opportunity to refute them (or offer mitigation), that is, an opportunity to prove the changes false by argument and/or evidence.19/ This cannot be done without specific notice of the alleged acts or events to which the employer is referring. As "guilty" as Appellant was at the time of the pre-dismissal hearing, he could only guess that the employer was referring to propane tanks, but could not have ***known*** from the notice whether the employer was in fact basing the charges on the tank transactions, and if so, whether these were the only "RV related materials" that he was being charged with offering for sale. Under such circumstances appellant could not be sure whether he was answering a charge or potentially adding to the list.20/

One final observation needs to be made. Personnel Division Rule 81-100 requires written notice of dismissal, and states that "[s]uch notice shall *include* the grounds for the disciplinary action as provided in ORS 240.555 and the *specific charges*

*and facts* supporting the statutory charge." (Emphasis supplied). Though not argued by Appellant, we believe the May 12, 1981 dismissal letter, inasmuch as it simply references the nonspecific pre-dismissal letter, fails to state "specific . . . facts" supporting the charges. For this reason as well, the dismissal must be set aside.

ORDER

The dismissal is set aside.

DATED this 5th day of March 1982.

[Signatures and certification omitted in printing.]

This Order may be appealed pursuant to ORS 183.482.

## FOOTNOTES

1. U.S. Cruiser also goes by the name R.V. Clinic. Apparently the owner, Evoniuk, has both a manufacturing outlet (U.S. Cruiser) which is subject to regulation by Respondent and a retail outlet (R.V. Clinic) which is not a regulatee.

2. Appellant's testimony was that he only agreed to sell the tanks after U.S. Cruiser's owner indicated he wanted them in the worst way. The more credible testimony of U.S. Cruiser owner Vic Evoniuk was that Appellant offered the items to him for sale. According to Evoniuk the propane tanks were in the trunk of Appellant's car and he was only made aware of them when Appellant offered them for sale. This credibility determination is also based on the demeanor of the witnesses and the fact that there were a number of serious inconsistencies in Appellant's testimony throughout the course of the hearing.

   Appellant did not deny selling the propane tanks to Evoniuk although he only recalled one tank, but indicated that he believed the tank(s) would be used only in Evoniuk's retail business. Thus, according to Appellant he did not consider the transaction to be violative of Respondent's Conflict of Interest Policy which prohibits sales to ***regulated*** companies.

3. Appellant did not deny showing carpet samples to Pacific Remanufacturing and other regulatees but testified that he only did so as a courtesy to Caribou Manufacturing, not to make a profit for himself. The testimony of Pacific Manufacturing management (owner Doyle Hastings and assistant manager John Reay) was to the effect that Appellant merely indicated he had samples available and asked if they were interested at a price of $5 a yard. Although no mention was made of Caribou Manufacturing, both Hastings and Reay knew that Caribou was the source of the carpeting. A letter from Caribou Vice President Jerry Becraft confirms that Appellant was given carpet samples to show other manufacturers only. According to Becraft these samples were not given to Appellant for his personal profit.

4. Appellant also did not deny offering propane tanks for sale to

Pacific Remanufacturing management. According to Appellant, however, the tanks would have been used by Pacific Remanufacturing in their forklift, not in their regulated business, i.e., the building or customizing of recreational vehicles. Appellant felt that since the tanks would be used for other purposes by the regulatee the attempted sale did not violate Respondent's Conflict of Interest Policy.

5. Again, Appellant did not deny offering the tanks for sale to Hildula of Vandicraft but defended on the basis that he expected Hildula would use the tanks for purposes other than his regulated business. Specifically, Appellant expected that Hildula, who apparently also raises birds, would use the tanks to supply energy to the bird cages. However, the most credible evidence indicates Appellant said nothing to Hildula about using the tanks for his bird cages at the time he offered them for sale.

6. Appellant offered evidence suggesting that the Inspector who reported him was biased and, in fact, wished to foreclose the possibility of another Inspector being "bumped" by Appellant. This evidence is largely irrelevant and is not considered. Whether or not the other Inspector was biased against Appellant (and there is very little evidence that he was) is not germane to the issue of whether or not Appellant did the things for which he was dismissed.

7. Appellant's testimony at hearing was that after he received the letter from Caribou Manufacturing, he realized that in fact he had purchased four tanks, not two. Apparently Appellant sold two tanks to Evoniuk of U.S. Cruiser and kept the other two for his own use.

8. It is undisputed that Appellant purchased some surplus propane tanks from a regulatee, Caribou Manufacturing. While the credible evidence indicates there was no negotiation over the price of $10 apiece for the tanks, Appellant's own testimony about the purchase and the fact that Appellant subsequently resold two of the tanks to another regulatee for $50 apiece requires the conclusion that the price was flexible. This at least raises a potential conflict of interest situation which Appellant should have but did not report to his supervisor.

More importantly, the undisputed evidence indicates that Appellant attempted to sell the same propane tanks purchased from Caribou to other regulatees at a profit to himself and that on one occasion he was successful. As stated earlier, Appellant's testimony that he did not initiate the sale to Evoniuk of U.S. Cruiser is not credible and irrelevant in any event. Moreover, Appellant's argument that he did not believe it was a conflict of interest for him to offer these items for sale to regulatees because they would not be used for regulated purposes is irrelevant. The conflict of interest is the sale to a regulatee; it has nothing to do with how the regulatees intend to use the merchandise. At any rate, such offerings at the very least raise the question of a *potential* conflict. It has been communicated time and again to Respondent's employes and to Appellant in particular that any *potential* conflict of interest situation must be avoided and/or reported. Appellant certainly should have known this was at least a potential conflict and reported it. Had he done so he would have been protected. The same analysis applies to Appellant's contacts with respect to the rug samples from Caribou Manufacturing.

9. The essence of Respondent's business is to regulate certain businesses, in this case recreational vehicle manufacturers. To do this effectively it is absolutely essential that there be no hint of any conflict of interest by those who are called upon to regulate. Accordingly, respondent has emphasized to its inspectors orally and in writing the necessity of avoiding and/or reporting any *potential* conflicts of interest. Specifically, employes have been admonished that it is a conflict of interest to sell merchandise to a regulatee. Moreover, Appellant has on prior occasions been individually counseled about such transactions and has acknowledged his understanding of the policy. Under these circumstances the seriousness of the proven charges clearly outweighs Appellant's prior satisfactory performance. (We find no evidence of bad faith.)

10. Due Process Clause of the 14th Amendment to the United States Constitution and (presumably) Art. I, § 10, the "justice and remedies" clause of the Oregon Constitution.

11. See testimony of Ellinwood, Tr. p. 321; testimony of Jacobson, Tr. pp. 163, 164.

12. E.g. charges relating to inefficient performance, or neglect of duties over a period of time.

13. E.g. the date and time of unauthorized absences from work or the date and time of an alleged theft of property.

14. As discussed below, the degree to which an employe's opportunity to refute or mitigate could be handicapped cannot be gauged by what the employe is ultimately proven to have known.

15. If the accused had committed some of, none of or more than the alleged forbidden acts, the lack of specificity would effectively preclude an admission, denial or refutation. See transcript of pre-dismissal meeting where Appellant repeatedly complained about the lack of specifics in the notice while attempting to refute what he thought might be on the employer's mind (e.g. propane tanks, carpet samples, doorstops, a junk battery, electric clock parts, plastic tubing).

16. The rule is couched in mandatory terms, and is not in the least ambiguous.

17. *Tupper v. Fairview Hospital and Training Center*, Case No. 281, 22 Or. App. 523, 540 P. 2d 401 (1975); 276 Or. 657 (1976); and *Hammer v. Oregon State Penitentiary*, Case No. 309, 23 Or. App. 743, 543 P.2d 1094 (1975); 274 Or. 651 (1976); 434 U.S. 945; 283 Or. 369.

18. *Ashman v. Children's Services Division*, Cases No. 562-579, 37 Or. App. 865 (1978)

19. This is far more than "enough information from which to form a general denial. . . ." (Respondent's brief in Support of Oral Argument, p. 4, lines 11-12)

20. Our conclusions on the notice issue may well exalt form over substance. Mr. Payne clearly committed the acts complained of, and just as clearly those acts warrant dismissal. Moreover, it is difficult to see how Payne was actually harmed by Respondent's failure to provide more specific notice (i.e. comply with the rule). But see *The Grog Houses v. OLCC*, 12 Or. App. 426 (1973) at 432, 433. Nevertheless, we do not believe that noncompliance with a

rule intended to afford "due process" notice can be ignored on the basis that such noncompliance was ultimately shown to be nonprejudicial. See generally, *Stalder v. Board of Medical Examiners*, 37 Or. App. 853 at 860 (1978); *Wallis v. Crook County School District*, 13 Or. App. 174 (1973); *Campbell v. Board of Medical Examiners*, 16 Or. App 381 (1974).

# APPENDIX E

Argued June 7, reversed and remanded November 18, 1976, petition for rehearing denied January 11, 1977

## TUPPER, *Respondent—Cross-Petitioner,*

*v.*

## FAIRVIEW HOSPITAL AND TRAINING CENTER et al, *Petitioners.*

556 P2d 1340

Public employe appealed from Public Employe Relations Board's order affirming his dismissal as a psychiatric aide at state institution for mentally deficient. The Court of Appeals, Virgil Langtry, J., 22 Or App 523, 540 P2d 401, affirmed. After granting employe's and institution's petitions for review, the Supreme Court, Howell, J., held that failure to notify employe of the charges against him prior to his dismissal as result of his failure to fully reassemble records within his "program book" after he lost such book, failure to inform him of the kinds of sanctions being considered and failure to give him an opportunity to refute the charges orally or in writing before a person authorized to make the final decision or to recommend a final decision denied employe due process and rendered the dismissal invalid; and that employe was entitled to an award of back wages and other benefits and to receive such amounts until he was properly discharged.

Reversed and remanded with directions.

O'Connell, J., specially concurred and filed opinion.

**1. Constitutional law—Due process**

Fourteenth Amendment imposes procedural due process constraints on governmental actions which deprive individuals of significant liberty or property interests. U.S.C.A. Const. Amend. XIV.

**2. Constitutional law—Employe had "property interest" in continued employment**

Public employe had a constitutionally significant "property interest" in his continued employment as a psychiatric aide at state institution for mentally deficient; thus, it was required that employe be afforded procedural due process before he could be discharged from such position. ORS 240.560; U.S.C.A. Const. Amend. XIV.

**3. Officers—Dismissal—Prior notice**

Governmental deprivation of a property interest in continued public employment must be accompanied by at least minimal procedural protections including some form of notice of the contemplated action and some sort of opportunity to be heard if that action is contested. U.S.C.A. Const. Amend. XIV.

**4. Constitutional law—Due process**

Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail. U.S.C.A. Const. Amend. XIV.

**5. Constitutional law—Due process—Hearing before discharge**

"Due course of law" provision within State Constitution does not require that a classified employe of public agency be given a full hearing before agency can discharge him. Const. Art. I, § 10.

**6. Constitutional law—Employe denied due process—Dismissal invalid**

Failure to notify public employe of the charges against him prior to his dismissal as a psychiatric aide at state mental institution as result of his failure to fully reassemble records within his "program book" after he lost such book, failure to inform him of the kinds of sanctions being considered and failure to give him an opportunity to refute the charges orally or in writing before a person authorized to make the final decision or to recommend a final decision denied employe due process; thus, the dismissal was invalid. ORS 240.560; U.S.C.A. Const. Amend. XIV.

**7. Officers—Written notice prior to dismissal**

Whenever possible, public employe should receive written notice of charges against him, of the proposed sanction, and of his right to an informal hearing.

**8. States—Employe entitled to back wages where dismissal invalid**

Public employe, whose dismissal as a psychiatric aide at state mental institution was invalid as result of a denial of procedural due process prior to dismissal, was entitled to an award of back wages and other benefits and to receive such amounts until he was properly discharged; in determining those amounts, Public Employe Relations Board was to offset any compensation and other benefits employe received after his original dismissal. ORS 183.482, 183.482(8)(b), 240.560, 240.563; U.S.C.A. Const. Amend. XIV.

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CJS, Constitutional Law § 600.

In Banc

On review from the Court of Appeals.*

*W. Michael Gillette,* Solicitor General, Salem, argued the cause for petitioners. Also on the briefs were Lee Johnson, Attorney General, Salem, and John W. Burgess, Assistant Attorney General, Salem.

*Henry H. Drummonds* of Kulongoski, Heid, Durham & Drummonds, Eugene, argued the cause and filed briefs for respondent/cross-petitioner.

Reversed and remanded.

HOWELL, J.

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*Review of order of Public Employe Relations Board. 22 Or App 523, 540 P2d 401 (1975).

**HOWELL, J.**

This case is before us on review from a decision of the Court of Appeals, 22 Or App 523, 540 P2d 401 (1975), which upheld the action of the Public Employe Relations Board (PERB) in affirming Tupper's dismissal from public employment by Fairview Hospital and Training Center. The Court of Appeals held that the hospital's pretermination proceedings were constitutionally inadequate, but affirmed Tupper's dismissal on the basis of the post-termination hearing conducted by PERB. The Court of Appeals also held that Tupper was entitled to an award of "lost wages and other benefits" for the time between his dismissal and the post-termination hearing, but refused to grant that relief in this proceeding on the grounds that PERB lacked the legislative authority to make such an award. Both Tupper and Fairview Hospital petitioned this court for review of that decision. We granted these petitions, as well as those in the companion case, *Hammer v. Oregon State Penitentiary,* 23 Or App 743, 543 P2d 1094 (1975), in order to consider what types of pretermination and post-termination procedures are constitutionally required when a public agency seeks to dismiss a classified employee.

Prior to his dismissal, Tupper had been employed for approximately six years at Fairview Hospital, a state institution for the mentally deficient which is operated by the Mental Health Division of the Department of Human Resources. As a psychiatric aide, Tupper's duties included the supervision and training of the "residents" living in one of several small, dormitory-like "cottages." His responsibilities included preparing and maintaining a "program book" in which the progress made by his residents in various training programs was recorded. The record indicates that these program records were essential to the successful operation and continued funding of these programs.

On April 22, 1974, Tupper's supervisor discovered that Tupper had lost his program book. Tupper agreed to reassemble these records by May 1. When Tupper failed to complete the work by this deadline, he was given until the 24th of May to finish. However, no further progress was made by that date. After four more weeks of remonstrating, Tupper's supervisor sent him a written warning informing him that if the work was not completed by July 10, "this will be considered insubordination and disciplinary action will follow."

When July 10 arrived, Tupper had made additional progress, but some of the records still remained incomplete. On July 15, Tupper was suspended for the day and presented with another memo advising him that "further disciplinary measures" would be taken unless the records were completed by the following day. On July 17, more progress had been made, but the work remained unfinished. Tupper was again suspended for the day and ordered to complete the job by the 18th. However, Tupper's program book remained unchanged on the 18th.

On July 23, 1974, after reviewing Tupper's situation with his supervisors, the director of the psychiatric aide staff recommended a dismissal. The following day, without first notifying Tupper of the contemplated dismissal and affording him an opportunity to be heard, the superintendent of Fairview suspended Tupper without pay and dismissed him effective August 2, 1974. A letter was then sent to Tupper informing him of this action and detailing the facts relied upon in support of the dismissal.

After his dismissal, Tupper sought a hearing before PERB. The hearing was conducted on December 5, 1974, before a hearings examiner. On January 14, 1975, the hearings examiner issued his "Proposed Findings of Fact, Conclusion of Law, and Order," which recommended affirming Tupper's dismissal. Tupper then filed his objections to the proposed order,

and, on March 21, 1975, the board issued a final order which essentially adopted the proposals of the hearings examiner and upheld the dismissal.

Tupper then sought judicial review of this order in the Court of Appeals. While the Court of Appeals concluded that the hospital violated Tupper's rights to procedural due process by failing to notify him of his proposed dismissal and offering him an opportunity to be heard, the court also determined that the subsequent PERB hearing supplied the due process previously lacking and held that Tupper was entitled only to an award of back wages for the period between the date of his dismissal and the date of the hearing.

In its petition for review of that decision, Fairview contends that a pretermination hearing is not constitutionally required in every case and that the post-termination hearing conducted by PERB, together with the repeated encouragements, conferences, demands, warnings, etc., was sufficient to satisfy due process requirements in the present situation. Tupper's petition essentially takes the position that the Court of Appeals was correct in deciding that the hospital violated his due process rights by dismissing him without notice and without an opportunity to be heard, but he contends that the subsequent PERB hearing was not sufficient to remedy this violation. He argues that the PERB hearing is not a de novo proceeding and that a review hearing which accords weight to a procedurally defective initial decision merely perpetuates the original denial of due process. Tupper also argues that even if the Court of Appeals correctly decided that the post-termination hearing was constitutionally adequate, he is then entitled to an award of back pay not merely from August 2, 1974 to December 5, 1974, the date of the hearing, but to March 21, 1975, the date of the board's final decision. Because of our disposition of this case, we will discuss only the first two of these issues.

1, 2. The fourteenth amendment to the United States

Constitution imposes procedural due process constraints on governmental actions which deprive individuals of significant liberty or property interests. Fairview does not dispute the fact that Tupper had a constitutionally significant "property interest" in his continued employment, and we find that he clearly did. *See* ORS 240.560; *Papadopoulos v. Bd. of Higher Ed.,* 14 Or App 130, 511 P2d 854, S Ct *rev. denied* (1973), *cert. denied* 417 US 919 (1974). *See also Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974); *Perry v. Sindermann,* 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972); *Board of Regents v. Roth,* 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972). *Compare Bishop v. Wood,* 426 US 341, 96 S Ct 2074, 48 L Ed2d 684 (1976).

3. Governmental deprivation of such a property interest must be accompanied by at least minimal procedural protections including some form of notice of the contemplated action and some sort of opportunity to be heard if that action is contested. *Arnett v. Kennedy, supra. See also Mathews v. Eldridge,* 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976); *Wolff v. McDonnell,* 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974). The particular form of the notice and hearing required, however, will vary from case to case depending upon the particular circumstances and interests involved. *Mathews v. Eldridge, supra; Morrissey v. Brewer,* 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484 (1972); *Cafeteria & Restaurant Workers Local 473 v. McElroy,* 367 US 886, 81 S Ct 1743, 6 L Ed 2d 1230 (1961).

4. In this case, the dispute centers upon what process is due prior to the initial dismissal and pending subsequent review. The determination of this issue requires an analysis of several factors. As most recently stated by the United States Supreme Court:

> "* * * identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous

> deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* supra 96 S Ct at 903.

*See also* Friendly, *Some Kind of Hearing,* 123 U Pa L Rev 1267, 1278 (1975).

5. The factors which must be weighed in this case are similar to those considered by the United States Supreme Court in *Arnett v. Kennedy, supra.* In *Arnett* the court sustained the validity of the federal pretermination procedures for dismissing an employee for cause. These procedures included notice of the action contemplated, a copy of the charge, reasonable time for filing a written response and supporting affidavits, and an opportunity for an oral appearance upon request. Then, following the dismissal, a full evidentiary hearing was provided. In upholding this procedural scheme, Justice Powell balanced the interest of the individual employee in continued public employment pending an evidentiary hearing against the government's interest in the expeditious removal of an unsatisfactory employee.[1] Powell noted that the procedures in *Arnett* "minimize[d] the risk of error in the initial removal decision and provide[d] for compensation for the affected employee should that decision eventually prove wrongful." 416 US at 170. He then concluded that a full evidentiary hearing need not be provided prior to the employee's dismissal and that the

[1]Several separate opinions were filed in *Arnett,* none of which commanded the support of a majority of the court at the time. However, both the United States Supreme Court and the lower federal courts have since been following the reasoning of the opinion written by Justice Powell in that case, and we have determined to do so as well. *See, e.g., Mathews v. Eldridge,* 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976); *Boehning v. Indiana State Emp. Ass'n, Inc.,* 423 US 6, 96 S Ct 168, 46 L Ed 2d 148 (1975); *Goss v. Lopez,* 419 US 565, 95 S Ct 729, 42 L Ed 2d 725 (1975); *Frost v. Weinberger,* 515 F2d 57 (2d Cir 1975); *Rolles v. Civil Ser. Comm.,* 512 F2d 1319 (DC Cir 1975); *Eley v. Morris,* 390 F Supp 913 (ND Ga 1975); *Young v. Hutchins,* 383 F Supp 1167 (MD Fla 1974).

procedures employed in *Arnett* provided "a reasonable accommodation of the competing interests." *Id.* at 171.[2]

The corresponding interests of the employee and the government in this case are similar to those in *Arnett.* The scope of the post-termination hearings is also similar. However, in contrast to the rather extensive pretermination procedures existing in *Arnett,* under the termination system utilized in this case virtually no procedural safeguards were employed prior to the actual dismissal. Although Tupper was repeatedly counseled and warned that "further disciplinary measures" might be taken, he apparently was never notified that termination was being considered and was never given an opportunity to defend himself before the officials who decided that he should be dismissed. Due to the absence of these important procedural safeguards, the risk of an erroneous deprivation of the employee's interest in continued employment pending a full evidentiary hearing was substantially greater in this case than it was in *Arnett.*

6, 7. Moreover, even the relatively extensive pretermination procedures involved in the *Arnett* decision were found to be constitutionally adequate by only a fairly

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[2]The concurring opinion in this case apparently acknowledges that the due process clause of the federal constitution, as interpreted by the United States Supreme Court in *Arnett,* does not require a full-scale evidentiary hearing prior to the dismissal of a classified employee. However, that opinion then takes the position that the "due course of law" provision in Article 1, § 10, of the Oregon Constitution should be interpreted to require a full pretermination hearing in such cases. This issue was never raised, briefed or argued by the parties in this case. Moreover, as demonstrated by the cases cited in footnote four of the concurring opinion, the procedural effect of state "due course of law" constitutional provisions is essentially the same as the procedural effect of the due process clause of the fourteenth amendment to the federal constitution. Therefore, in the absence of some compelling public interest in giving Art 1, § 10, of our constitution a broader interpretation in this situation than that given to the due process clause of the fourteenth amendment by the federal courts, we decline to adopt such a construction. *Compare State v. Childs,* 252 Or 91, 99, 447 P2d 304 (1968) *with Deras v. Meyers,* 272 Or 47, 64 n.17, 535 P2d 541 (1975). *See also Olsen v. State of Oregon,* 276 Or 9, 554 P2d 139 (1976); *Plummer v. Donald M. Drake Co.,* 212 Or 430, 320 P2d 245 (1958).

narrow margin.[3] Therefore, on the basis of *Arnett v. Kennedy, supra,* and in view of the competing interests involved in these cases, we conclude that in addition to his full post-termination hearing Tupper was entitled to the following procedural safeguards prior to his dismissal. First, he should have been notified of the charges against him. Second, he should have been informed of the kinds of sanctions being considered. Third, he should have been given at least an informal opportunity to refute the charges either orally or in writing before someone who was authorized either to make the final decision or to recommend what final decision should be made.[4]

8. Since none of these safeguards were provided, we find that the procedures employed did not comply with the due process clause of the fourteenth amendment and that Tupper's dismissal on August 2, 1974, was invalid. Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated.[5] In determining these amounts, the Board should offset any compensation and other benefits Tupper has received since his original termination.

Reversed and remanded to the Court of Appeals

[3] Four of the nine Justices dissented, at least in part. Marshall, Douglas and Brennan dissented on the grounds that a full evidentiary hearing was required prior to the dismissal. White concurred in part and dissented in part on the grounds that the pretermination procedures involved in that case were adequate only if an impartial hearings officer made the termination decision.

[4] In the interest of avoiding unnecessary controversy, we feel that whenever possible the employee should receive written notice of the charges, of the proposed sanction, and of his right to an informal hearing.

[5] The Court of Appeals seems to have concluded that PERB lacked the necessary authority to order an award of back wages upon a finding that the termination was procedurally invalid. Although there is apparently nothing in the authorizing statute which gives PERB the authority to issue such an order on its own, *see* ORS 240.560, the constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made. Moreover, ORS 240.563 and 183.482 specifically authorize the reviewing court to reverse or remand the agency's order if it finds "[t]he statute, rule or order to be unconstitutional." ORS 183.482(8)(b).

with directions to order the Public Employe Relations Board to issue an order awarding back wages and other benefits until such time as a valid termination has occurred.

**O'CONNELL, J.,** specially concurring.

The pivotal question raised by the state's petition for review and Tupper's cross-petition for review is the validity of the procedures for termination under ORS 240.555, 240.560 and Personnel Rule 81-100, tested by the constitutional requirements of due process. More specifically, the question is whether a pre-termination hearing is required to satisfy due process requirements.[1] Both this case and the companion case, *Hammer v. Oregon State Penitientiary,* decided this day, were briefed and argued solely with reference to the due process clause of the Fourteenth Amendment. Within the framework it seems probable from *Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed2d 15 (1974), that a post-termination hearing is sufficient to satisfy the federal requirement of due process, at least if certain safeguards such as notice of the charges and an opportunity to respond precede the dismissal. Neither the petitioner nor respondent have sought to determine whether the Oregon Constitution goes beyond this interpretation of the federal constitution, guaranteeing a greater protection in a procedural way to an employee with entitlement. It is important that this inquiry be made because if there is an applicable provision in our constitution which can be construed as requiring a pre-termination hearing, any discussion of the Fourteenth Amendment and its interpretation in the *Arnett* case is, of course irrelevant.[2]

Since the applicability of the Oregon Constitution

[1] Although the constitutional question might have been avoided by interpreting ORS 240.555 and 240.560 as requiring a pre-termination hearing, Personnel Rule 81-100, adopted pursuant to the authority vested in the Public Employe Relations Board under ORS 240.555(1) to establish termination procedures, provides for a post-termination hearing.

[2] *See,* Linde, *Without "Due Process,"* 49 Or L Rev 125, 133 (1970).

was not raised by counsel, the preliminary question is whether this court can raise it sua sponte. This is not the situation, frequently presented, where a constitutional question is not raised at the trial stage and is raised for the first time by counsel on appeal. In the present case it is assumed that a constitutional question of procedural due process under the federal constitution is properly presented; the question is whether this court should, on its own motion, consider the related question of the applicability of Art. I, § 10 of the Oregon Constitution. Since the matter is of substantial public concern, it is our duty to consider it.[3]

Art. I, § 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

It has been strongly argued by Professor Hans Linde that the guarantees in Art. I, § 10 are not the precise equivalents of the guarantees found in the Fourteenth Amendment.[4] Assuming, without deciding, that this is

[3]Inasmuch as the right to a pre-termination hearing is the principal question involved and since this question of the timing of the hearing would involve a similar policy analysis under both the federal and state constitutions (assuming the latter is applicable), there would be no reason to call for supplemental briefs.

[4]Linde, *Without "Due Process,"* 49 Or L Rev 125 (1970). Professor Linde interprets Art. I, § 10 as a "remedies clause" merely guaranteeing a legal remedy for private wrongs derived from Chapter 40 of the Magna Carta ("To no one will we sell, to no one will we deny, or delay right or justice"), and is not a "due process" clause providing guarantees against official deprivations "except by the law of the land"—clauses derived from Chapter 39 of the Magna Carta ("NO free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land"). When the Magna Carta was re-issued under Henry III, the two clauses were combined under Chapter 29, which eventually was enacted as a statute by Parliament in 1797. Art. I, § 10 and its predecessors say more than Chapter 40 does, and it is possible that the constitutional draftsmen intended to embody the two ideas expressed in Chapter 29 of Magna Carta. In any event, in the states which have provisions similar to Art. I, § 10 the courts, including this court, have

(*Continued on following page*)

so, it seems clear that the two constitutional provisions are the same insofar as each would prohibit the deprivation of the interests specified in the respective provisions of the federal and Oregon constitutions without fair procedures generally associated with the term "due process."

In the present case the interest of Tupper is denominated an "entitlement." Comparable interests of public employees have been classified as "property" interests.[5] The inquiry is, therefore, whether the guarantee of Art. I, § 10, of the Oregon Constitution, which prohibits injury to person, property or reputation without due course of law, and guarantees the complete administration of justice, is satisfied by anything short of a pre-termination hearing. In addi-

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(Continued from previous page)

regarded the provisions as the equivalent of the due process clause of the Fourteenth Amendment. *See*, (interpreting Indiana Constitution, Art. I, § 12) *Hale v. State*, 248 Ind 630, 230 NE2d 432, 435 (1967); *Sweet v. State*, 233 Ind 160, 117 NE2d 745, 746-47 (1954); *Hamm v. Review Board of the Indiana Employment Security Div.*, 132 Ind App 318, 177 NE2d 337, 338 (1961); *Freeman v. Pierce*, 179 Ind 445, 101 NE 478, 479 (1913), and (interpreting Ohio Constitution, Art. I, § 16) *Ex Parte Martin*, 139 Ohio St 609, 41 NE2d 702, 706 (1942); *State ex rel Smilack v. Bushong*, 159 Ohio St 259, 111 NE2d 918, 922 (1953), and (Oregon) *State v. Bouse*, 199 Or 676, 686, 264 P2d 800 (1953). *Cf., School Dist. No. 7 v. Weissenfluh*, 236 Or 165, 173, 387 P2d 567 (1963) and *Columbus Packing Co. v. State*, 106 Ohio St 469, 140 NE 376, 378 (1922).

Even if Art. I, § 10 is interpreted as not including a substantive due process provision, it does require procedural due process in the sense of requiring a remedy for injuries to person, property or reputation. If an entitlement is "property", the employee is entitled to a "remedy by due course of law" to retain it. That remedy must be provided by the state. It is for us to say whether it is a remedy "by due course of law" if the employee is given a hearing only after he has been discharged.

[5] *See, e.g., Arnett v. Kennedy*, 416 US 134, 94 S Ct 1633, 40 L Ed2d 15 (1974) (the separate opinions reveal a consensus that such an "entitlement" is a property interest); *Perry v. Sindermann*, 408 US 593, 92 S Ct 2694, 33 L Ed2d 570 (1972); *Comment*, 10 Harv Civil Rights L Rev 472, 473 (1975). *Cf.*, Reich, *The New Property*, 73 Yale L J 733 (1964).

The recent cases of *Mitchell v. W. T. Grant Co.*, 416 US 600, 94 S Ct 1895, 40 L Ed2d 406 (1974) and *North Georgia Finishing v. Di-Chem.*, 419 US 601, 95 S Ct 719, 42 L Ed2d 751 (1975) have created uncertainty in this area. *See* opinions of Stewart, J. in *Mitchell* and *North Georgia Finishing*. Regardless of the direction finally taken by the U. S. Supreme Court, I believe that plaintiff in the present case has a property interest protected by the justice and remedies clause of the Oregon Constitution.

tion to being a "property" interest, job tenure is also a "reputation" interest. The stigma which an employee suffers upon being discharged from his job, even if only temporarily, can be regarded as an injury to his "reputation," thus qualifying as a protected interest under Art. I, § 10.[6]

Beginning, then, with the recognition of a constitutionally protected interest in the petitioner, the court is faced with the question posed above—is a pre-termination hearing necessary to meet the minimum standards of due process? In answering this question, it must be recognized that the procedural requisites for a due process hearing vary depending upon the importance of the interests involved. On one hand are the interests of the government in expeditiously removing an unsatisfactory employee; on the other hand are the interests of the employee in retaining his job. In the *Arnett* case Justice Powell, in a specially concurring opinion, concluded that the interest of the government as employer outweighed the interest of the employee in balancing the need for a pre-termination hearing. He stated:

> "* * * Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

He added that

> "* * * [A] requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges." 40 L Ed2d at 41.

[6] Discharge from a government job often seriously injures the employee's business and professional reputation. There is a widely held impression that it is difficult to fire government workers, and this contributes to the belief that anyone fired by the government is probably unemployable. *See*, Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va L Rev 196, 204 (1973); and *Due Process and Public Employment in Perspective: Arbitrary Dismissals of non-Civil Service Employees*, 19 UCLA L Rev 1052, 1065 (1972). Discharge from a job often damages the employee's personal reputation, too, since status in our society is so closely related to an individual's source of livelihood. *See*, Reich, *The New Property*, *supra* note 5.

It is difficult to understand how Mr. Justice Powell could have recited the foregoing as the reasons for his conclusion in the face of the very thorough study of Professor Merrill marshalling facts which point to a contrary conclusion.[7] As to "additional administrative costs," "delay" and the alleged deterrence of warranted discharges, Merrill points out that "The data * * * show that in 1970 agencies that provided hearings in advance generally processed cases faster than those that made a hearing available only on appeal." He adds that "available data clearly do *not* show that conducting the hearing afterwards helps shorten the process."

The contention that the retention of an unsatisfactory employee pending a hearing might be disruptive loses most of its force when it is revealed that the law and regulations existing at the time *Arnett* was decided required that an employee be given at least thirty days' notice of a proposed adverse action so that, as pointed out by Merrill, "agency personnel even now must function for at least a month with the threatened employee in their midst."[8] There is no reason to assume that a hearing could not be scheduled and held within that thirty-day period.[9] There are other data and factors which could be recited to prove that it is not necessary in the interest of office efficiency to postpone the termination hearing.[10] In fact, a pre-termination hearing should *enhance* efficiency by giving the agency an incentive to expedite disposition

[7]The substance of the report is contained in an article entitled *Procedures for Adverse Actions Against Federal Employees*, *supra* note 6. On the basis of Merrill's report, the Administrative Conference of the United States strongly recommended that evidentiary hearings be held prior to discharge.

[8]Merrill, *supra* 59 Va L Rev at 241.

[9]"[T]here seems little reason why a hearing could not be held during that 30-day period." Marshall, J., dissenting, 416 US at 225.

[10]*E.g.*, *see* Marshall, J.'s dissent in *Arnett*; Merrill, *supra* 59 Va L Rev 196 at 238-246; *Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees*, 10 Harv Civil Rights L Rev 472 (1975).

of the matter, allowing it to get on with its primary functions. [11]

The conclusion is, then, that the government as employer has no interests which outweigh those of the employee calling for the postponement of the hearing until after termination has been effected. There being no identifiable governmental interests deserving special protection, the hearing requirements necessary to satisfy due process are the same in preserving the interests of an employee whose job is threatened as they are where an owner's property is sought to be taken or where a person's liberty is at stake.[12]

I am satisfied that due process requires a prior hearing before *property* can be taken.[13] On the same facts, I would regard Art. I, § 10 as requiring the same pre-taking procedure. Since I regard an entitlement as a species of property within the meaning of Art. I, § 10, an employee having such an interest is entitled to have a hearing before that interest is taken from him.

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[11] *See*, 59 Va L Rev at 245.

[12] Cf., *Fuentes v. Shevin*, 407 US 67, 92 S Ct 1983, 32 L Ed2d 556 (1972), where it was held that due process requires a prior hearing before property can be taken through the use of state law replevin procedures to repossess chattels; and *Morrissey v. Brewer*, 408 US 471, 92 S Ct 2593, 33 L Ed2d 484 (1972), where it was held that due process requires a prior hearing before a person can be deprived of liberty through state parole revocation.

[13] *See, Fuentes v. Shevin*, 407 US 67, *supra* note 12; *Sniadach v. Family Finance Corp.*, 395 US 337, 89 S Ct 1820, 23 L Ed2d 349 (1969).

No. 83-1275

# In the Supreme Court of the United States

OCTOBER TERM, 1983

**STATE OF OREGON
DEPARTMENT OF COMMERCE,**

**Petitioner,**

v.

**TOMMY G. PAYNE,**

**Respondent.**

## Response to the Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

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## QUESTIONS PRESENTED

1. Respondent accepts the proposition that this case does involve the acceptability of a pre-termination notice which violates the due process clause's 14th Amendment because it does not specify particular dates, places and persons.

2. This case does not present the questions attempted to be raised by petitioner in its second listing; i.e., whether full back pay is allowable as a remedy when a discharge is found wrongful because of a procedural defect in the pre-termination process which violates the 14th Amendment due process clause. Amongst others, the following distinctions exist in this case:

   a. The insufficiency of notice of charges was one of a series of defects occurring during the pre-termination process.

b. The pre-termination defects irretrievably tainted the post-termination hearing.

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## TABLE OF AUTHORITIES

Respondent Tommy Payne respectfully responds herein in opposition to the Petition for a Writ of Certiorari.

**SUPPLEMENTAL STATEMENT OF THE CASE**

Issuance of the charges involved here and the conduct at the pre-dismissal hearing are described by the Employment Relations Board as follows:

> "Appellant was suspended pending pre-dismissal process on April 29, 1981. By letter of the same date Respondent notified Appellant of the charges against him but did not divulge the source of their information, the regulatee's Appellant allegedly contacted, nor the kind of R.V. material allegedly sold or offered for sale. During the pre-dismissal hearing Appellant was given an opportunity to 'respond' to the charges but again he was not given anymore specifics about the complaints against him. Respondents refusal to divulge specifics of the complaint was based on advise of Counsel. At the pre-dismissal hearing Appellant repeatedly complained about the specifics in the notice, stating that he could not answer the charges without more information. When questioned during the hearing about selling any merchandise to regulatees Appellant denied that he had done so." (Petitioner's Brief App-26, App-27).

At Page App-29 of Petitioner's Brief, the ERB Report shows that it accepted the fact that:

> "There is no dispute that the respondent possessed the information at the time of issuance of the pre-dismissal notice and did not divulge it until after Appellant's dismissal." (Underlining part of text).

Also, as quoted at Page App-26 of Petitioner's Brief, the ERB describes a conference of April 27, 1981 in the following terms:

> "On April 27, 1981, the Administrator of the Building Codes Division, Trevor Jacobson, and the Section Head, Don Ellinwood (sic), met with Appellant to discuss his interactions with regulatees. Appellant told them that he had purchased two surplus propane tanks from Caribou Manufacturing for a fixed price. In the course of this meeting, Appellant was also asked on a number of occasions whether he had sold or attempted to sell any merchandise to regulatees. He falsely denied ever doing so." (Underlying ours).

The Court of Appeals, as reported in Petitioner's Brief at 5, described the pre-dismissal hearing as follows:

> "During his pre-dismissal hearing Payne was given an opportunity to 'respond' to the charges but was not given any more

> specifics about the complaints against him. Petitioner's refusal to divulge specifics to the complaints was based on advise of counsel. At the hearing, Payne repeatedly complained about the lack of specifics in the notice, saying that he could not answer the charges without more information. When questioned during the hearing about selling any merchandise to regulated persons or businesses, he denied he had done so."

Respondent Payne has appended to this brief the first three pages of the transcript of the pre-dismissal hearing, to indicate the nature and circumstances of the same. It is disclosed at App-1 that the hearing was one at which Mr. Payne had no counsel in attendance and at of which he was placed under oath prior to his testimony. (App-2).

As the quotations immediately above demonstrate, both the Employment Relations Board and the Court noted specifically the denial made by Mr. Payne regarding whether or not he had sold or offered to sell to regulatees any R.V. components. In the entire record,

this particular statement of Mr. Payne is the only testimony which is denominated "false" by the Employment Relations Board.

Mr. Payne's testimony at the post-termination hearing was measured by the Board as being that of a man who had previously denied falsely the major charge against him. This is due, of course, not only to the insufficient notice of charges; but also to the underlying generalized questions without information, both at the pre-termination conference and again at the pre-dismissal hearing under oath.

It is respectfully submitted that this conduct of the employer is a deprivation of substantial due process which so tainted credibility of the prosecuted witness as to require the proceedings to be null and void.

The Oregon Court of Appeals in the case of Gunsolley vs. Bushby, (19 Or. App. 884, 529 P.2d. 950) dealt with another case also

involving wrongful discharge through unconstitutional procedure. The Court of Appeals stated:

> "For purposes of determining a damages formula in a public employe discharge case, it is important to first identify the basis of the discharged employe's cause of action. The possibilities are: (1) a common law breach of contract action; (2) a claim that the discharge was in violation of the substantive standards for discharge stated in an applicable statute or regulation; (3) a claim that the discharge was accomplished in a manner in violation of the the procedural requirements of an applicable statute or regulation; (4) a claim that the discharge was, substantively, for a constitutionally impermissible reason; and (5) a claim that the discharge was, procedurally, accomplished in a constitutionally impermissible manner.*** The appropriate remedy in the second and fourth situations will ordinarily be reinstatement.
>
> When the claim made and established is that the procedural requirements of law or, as here, the constitution, were violated for a period of time, in general we believe the appropriate measure of damages to be awarded a public employe is solely the employe's lost wages and other benefits during the period of noncompliance."

## CONCLUSION

It is respectfully submitted that this case, because of gross pre-termination error, does not supply the foundation upon which the Federal question intended to be raised by Petitioner can, in fact, be raised.

Respectfully submitted,
HAROLD W. ADAMS
Counsel for Respondent

## APPENDIX A

TRANSCRIPT OF PRE-DISMISSAL HEARING

DH - Dave Hurd, Hearings Officer
TP - Tom Payne
DE - Don Ellinwood
MJ - Maureen Juhola

At the Labor and Industries Building in Salem, for a hearing regarding those matters contained in the pre-dismissal notice, served on Mr. Tom Payne, said notice is dated April 29, 1981. Parties present at this time are Tom G. Payne, the employee for whom this hearing is being held, Maureen Juhola from the Personnel Section of the Department of Commerce, and also present is Don Ellinwood representing the Department of Commerce Building Codes Division.

My name is David Hurd. I'm the Hearing's Officer selected by the Department of Commerce to conduct these proceedings. I am a Hearings Officer presently employed by the Builders Board within the Department. As stated in the pre-dismissal notice referred to above, Mr. Payne shall, by this proceeding, be afforded an opportunity to refuse or present mitigating circumstances on the charges made against him. This opportunity is made available pursuant to Oregon Revised Statutes 240.555 rule 81-605 of Chapter 8 of the Personnel Rules. Following the hearing, I will submit my findings in writing to the Administrator of the Building Codes Division. Those findings will be based solely on evidence presented during this hearing. It is also noted, the Hearings Officer may

question the parties and witnesses at any time during the hearing. Are there any questions so far? Would everyone please stand and raise your right hand. Do you solemnly swear and affirm that the testimony you are about to give is true? Let the records show that all parties that we just named have in fact been sworn in as witnesses.

At this time I would like to read what I consider the essence of this matter. It's what's been characterized as the pre-dismissal notice served on Mr. Payne. Let me start with that.

> It's to: Tom G. Payne, Building Codes Division, from Trevor Jacobson, Administrator, Building Codes Division.
>
> Subject: Misconduct charges April 29, 1981. The Memo says, "As an employee of the Building Codes Division of the Department of Commerce in the classification of Plumbing Instructor, you are hereby notified of charges in compliance which potentially justify your dismissal from state service.
>
> > Action: Suspension without pay effective April 30, 1981 not to exceed 30 days pending a pre-dismissal hearing for misconduct, malfeasance, insubordination, or unfitness to render effective state service pursuant to ORS 240.555.

Supporting facts:

1. You are employed to inspect recreational vehicles under construction in mobile homes/R.V. plants throughout the state. You have been issued a state car for official business.

2. By virtue of your position, it is understood that you have the power and authority to economically affect a person in the recreational vehicle business by granting or withholding approval to market a regulated unit in Oregon.

3. During the new employee orientation conducted by the Department of Commerce Personnel Section, you marked on a checklist that the conflict of interest policy had been discussed. You also expressed verbally to me on April 27, 1981 that you are knowledgable about the conflict of interest policy. (Me, of course, being Trevor Jacobson.)

4. You stated before your supervisor and me on April 27, 1981 that you are aware that offering for sale or selling merchandise would be in conflict with Department policy.

Charges and complaints:

1. Approximately one year ago you obtained a recreational vehicle related merchandise either by purchase, consignment, or other type of receipt.

2. You attempted to sell recreational vehicle merchandise while performing your inspection duties on at least four occasions to various RV businesses inspected by you in the normal course of your duties.

3. You also transported this merchandise in the trunk of your state car on at least one of these four occasions.

4. You have concealed from your supervisor the fact that you engaged in business transactions with such related business firms or plant owners, that you offered the merchandise for sale during the work hours and on state travel status, and that you were transporting some of this merchandise in a state car.

5. You failed to report your potential conflict of interest.

Hearing will be held to allow you the opportunity to be heard on these charges. At that time you may provide oral or written material in repudiation or mitigation of the charges and complaints. You may, if you choose, provide a written response prior to the hearing. The hearings will be held before the hearing's referee on May 8, 1981 at 10:00 a.m. in Room C of the Labor and Industries Building. You have the right to be represented at the hearing.

DH "I would like, on my own motion, to make this document part of the record, and I will mark it Exhibit 'A' for the record."

"Mr. Payne, I assume you received a copy of this or that you understand what I've just read, and you do realize that you have the right to be represented at this time, is that correct?"

TP "Yes"

DH "So you are familiar with everything I have read and you have no objections, at least to the Exhibit 'A' being made a part of the record?"

TP "No, I do not."

DH "Mr. Ellinwood, do you have any objections to it being made a part of the record?"

DE "No, I do not."

DH "Then, I think, at least in my opinion, it would be appropriate at this time for Mr. Payne to respond in any way he feels appropriate to this pre-dismissal notice that has just been marked Exhibit 'A'. In other words, I'll let him proceed with his opportunity to repute or mitigate the charges. Please proceed Mr. Payne."

TP "Alright. When I found out about the charges I was rather shocked, but I do not know which companies that are charging me or making statements that I sold anything. This information I would need to help defend myself. Too, I've not sold anything. I have purchased surplus things from plants, but so far it's very minimal, and it was not for sale. And I have a letter from Caribou Manufacturing because I was told that I was supposedly selling propane tanks, which I had gotten two in the past from Caribou Manufacturing, they were scrap tanks, I paid $10 a piece for them and I bought one junk battery, to make fishing leads out of, which I paid $5 for."

DH "OK. Let's go through that again. It's your contention that you haven't sold anything to anyone, as it relates to these charges, is that what you said?"

TP "That's correct."

DH "OK. And you said that you did purchase some 'scrap merchandise' as you characterize it, is that accurate?"

TP "Yes."

DH "OK. And you still have that scrap merchandise in your possession?"

TP "Yes sir, I do. I still have the propane tanks. I brought them in today; they are in the back of my vehicle."

DH "OK. You've taken the two scrap propane tanks, is that correct?"

TP "Yes."

DH "By 'scrap', what does that mean, they're no longer usable or salvageable, or what does that mean?"

TP "Well, they were junked by the Caribou Manufacturing. The ones that I have have broken valves and stuff on them, and I do not know why they scrapped them all out. At the time I purchased the two, they probably had 35 or 40 more in a big pile sitting getting rusty. They may have sold these, I don't know to whom."

DH "OK. So you bought two from the Caribou Manufacturing Company, is that correct?"

TP "That's correct. They went to a larger tank on their motor homes and they didn't, I guess they didn't, send them back to the people they bought them from. They've sold thousands of dollars worth of stuff to anybody that wanted to buy it, and this was a year ago when the R.V. industry went down, so . . ."

(TRANSCRIPT CONTINUES)